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Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem

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COMMON LAW OR SHIELD LAW? HOW RULE 501 COULD SOLVE THE JOURNALIST'S PRIVILEGE PROBLEM

Anthony L. Fargo[†] and Paul McAdoo^{††}

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I. INTRODUCTION

The 109th Congress adjourned in December 2006 without passing a federal shield law to protect journalists from subpoenas seeking the identities of confidential sources. Continued Bush administration opposition to such a law¹ and the crush of other business facing the “lame duck” Congress² combined to lead the Senate Judiciary Committee to delay a vote on Senate Bill 2831,³ the most recent Senate version of the proposed law, in September 2006.⁴ The bill never came up for a committee vote in the Senate, and the House did not even hold a committee hearing on its version of the bill.⁵

As 2006 came to a close, it also appeared unlikely that the Supreme Court of the United States would soon hear an appeal from reporters based on a claim that the First Amendment should afford journalists a privilege. In November 2006, the Court declined to stay a Second Circuit Court of Appeals ruling against the *New York Times* that opened the door for the government to subpoena reporters' phone records to aid a leak investigation.⁶ The Court took the unusual step of voting en banc on the motion, making it appear highly unlikely that it would grant certiorari to hear an appeal of the Second Circuit's ruling.⁷ The Court also denied certiorari in June 2006 in the appeals of two reporters subpoenaed to testify by a former Los Alamos nuclear scientist

1. *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing on S. 2831 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Paul J. McNulty, Deputy Att'y Gen., United States Dep't of Justice).

2. See Carl Hulse, *Lawmakers Wrapping Up Session but Leaving Loose Ends*, N.Y. TIMES, Dec. 4, 2006, at A18 (reporting that Congress was preparing to adjourn for the year without passing several spending measures and other bills).

3. Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006).

4. Walter Pincus, *Senate Panel Freezes Bill on Legal Protection for Reporters*, WASH. POST, Sept. 24, 2006, at A13.

5. Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005).

6. *New York Times Co. v. Gonzales*, 127 S. Ct. 721 (2006) (denying stay of *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006)).

7. Adam Liptak, *Court Clears Way for Prosecutor to Review Records in Times Case*, N.Y. TIMES, Nov. 28, 2006, at A20.

suing the government for leaking private information about him to the media.⁸ The scientist, Dr. Wen Ho Lee, claimed that the government violated the Privacy Act of 1974⁹ when investigators leaked information about him to reporters while he was under investigation for alleged espionage activities.¹⁰ Dr. Lee wanted the reporters to reveal the names of their sources for stories about him so he could press his civil suit more effectively. The U.S. Court of Appeals for the District of Columbia ruled against four reporters,¹¹ while a fifth reporter subpoenaed by Lee lost in his bid to quash the subpoena in a D.C. district court.¹²

The Supreme Court's decision was predictable given that Dr. Lee had settled out of court with the government and with the news organizations, thus making the appeal moot.¹³ Apparently, several news organizations paid part of the settlement in order to ensure that Lee would drop his demand that the reporters be held in contempt.¹⁴ A year earlier, the Court had also declined to review an appellate judgment against two reporters who hoped to avoid testifying in front of a grand jury investigating a leak that identified a Central Intelligence Agency (CIA) operative.¹⁵ Several other

8. Thomas v. Wen Ho Lee, 126 S. Ct. 2373 (2006); Drogin v. Wen Ho Lee, 126 S. Ct. 2351 (2006).

9. Privacy Act of 1974, 5 U.S.C. § 552a(b) (2006) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency" except as required or specifically allowed by law).

10. Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

11. Wen Ho Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005).

12. Wen Ho Lee v. Dep't of Justice, 401 F. Supp. 2d 123 (D.D.C. 2005).

13. Charles Lane, *In Wen Ho Lee Case, a Blow to Journalists After the Fact*, WASH. POST, June 6, 2006, at A3; Liptak, *supra* note 10, at A1.

14. Lane, *supra* note 13, at A3; Liptak, *supra* note 10, at A1.

15. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied sub nom.*, United States v. Miller, 545 U.S. 1150 (2005). *Time* reporter Matthew Cooper and *New York Times* reporter Judith Miller were found in contempt for failing to cooperate with the investigation. *Id.* at 976. *Time* and Cooper eventually agreed to cooperate after the Supreme Court denied certiorari, but Miller did not and was held in contempt of court until the grand jury disbanded or she testified. See Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. She was freed in September 2005 after her source released her from her promise of confidentiality. See David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1. Miller's source, I. Lewis Libby, Vice President Dick Cheney's chief of staff, subsequently was indicted on charges that he lied to investigators in the leak case. David Johnston & Richard W. Stevenson, *Cheney Aide Charged with Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1. A federal judge later quashed most of

cases are making their way through the court system,¹⁶ but since the Court last ruled in 1972 on whether journalists have a First Amendment right to decline to testify if doing so would identify a confidential source,¹⁷ it has denied certiorari in every similar case that has come its way.¹⁸

Congress's inability to bring a shield law to a vote during the 2004–06 term,¹⁹ the Supreme Court's unwillingness to revisit the question of whether journalists could claim protection from subpoenas under the First Amendment,²⁰ and a rising tide of adverse lower court decisions²¹ do not exhaust all options for journalists who insist on protecting source identities. If the First Amendment claim is a non-starter because of the Supreme Court's 1972 opinion in *Branzburg v. Hayes*,²² and a statutory privilege remains unavailable at least until sometime during this session of Congress, there is still a question as to whether journalists enjoy a federal common law privilege. The Court might be more willing to hear arguments on a case that tied protection for journalists and

Libby's subpoenas of the news media for notes and other material for his trial, but let stand a subpoena for drafts of a Matthew Cooper story about Cooper's grand jury appearance. *United States v. Libby*, 432 F. Supp. 2d 26, 43–44 (D.D.C. 2006).

16. See, e.g., *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (denying reporters' motion to quash subpoenas for testimony about sources for stories about grand jury testimony in regard to steroid use among Major League Baseball players); *In re Grand Jury Subpoena*, Joshua Wolf, No. 06-16403, 2006 U.S. App. LEXIS 23315 (9th Cir. Sept. 8, 2006) (denying appeal of freelance videographer who was held in contempt for refusing to turn over footage from violent protest in San Francisco to federal grand jury investigating destruction of police car).

17. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

18. See, e.g., *LaRouche v. Nat'l Broad. Corp.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

19. See *supra* notes 1–5 and accompanying text.

20. See, e.g., *Wen Ho Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *cert. denied sub nom.*, *Thomas v. Wen Ho Lee*, 126 S. Ct. 2373 (2006); *Drogin v. Wen Ho Lee*, 126 S. Ct. 2351 (2006); *In re Grand Jury Subpoena*, *Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

21. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) (denying appeal of television reporter who refused to reveal source for surveillance video he obtained and aired in apparent violation of gag order in public corruption case); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (rejecting existence of journalist's privilege in case in which American reporters' tapes of interviews with prosecution witness were subpoenaed in a Northern Ireland terrorism trial).

22. 408 U.S. 665 (1972).

their sources to Federal Rule of Evidence (FRE) 501 and the common law, which Rule 501 directs courts to use in the recognition of new privileges.²³ A 1996 Supreme Court case that recognized a privilege for psychiatric social workers, *Jaffee v. Redmond*,²⁴ offers some encouragement for journalists because the Court's decision in favor of the privilege relied in large measure on the fact that the states were unanimous in their support for the privilege.²⁵ Similarly, the states are nearly unanimous about the existence of a journalist's privilege.²⁶ Asking the Supreme Court, however, to recognize a common-law journalist's privilege also carries risks, in large part because journalists, unlike the social workers in *Jaffee*, are not licensed by the government, making it difficult to define a class of persons to whom the privilege would apply.

This article will examine the pros and cons of pinning the hopes of journalists who want to protect sources without risking punishment for contempt of court on a federal common-law privilege. Part II of this article will briefly discuss the history of the journalist's privilege after 1972 and discuss the extent to which federal and state courts have relied upon the common law in protecting journalists and their sources. In Part III, the article will examine FRE 501, which was created in 1975, three years after *Branzburg* was decided, and which forms the basis for federal privilege law in the last thirty years. In Part IV, the article will analyze the *Jaffee* decision and other federal court decisions arising from FRE 501. Part V will discuss factors that weigh in favor of recognizing a common-law journalist's privilege based on FRE 501 and court decisions interpreting it. Part VI will discuss the pitfalls of relying upon common law to clear up the muddle that federal journalist's privilege law has become. Part VII will analyze the pros and cons of a common-law journalist's privilege and will contrast them with the statutory protection that would be provided by the various shield bills introduced in the 109th Congress.

II. JOURNALIST'S PRIVILEGE LAW SINCE 1972

In *Branzburg v. Hayes*,²⁷ the Supreme Court rejected, by a 5-4

23. FED. R. EVID. 501.

24. 518 U.S. 1 (1996).

25. *Id.* at 12-13.

26. *See infra* Part II.A.

27. 408 U.S. 665 (1972).

vote, the position of three reporters that the First Amendment shielded them from testifying before grand juries investigating crimes.²⁸ While acknowledging that newsgathering needed “some” First Amendment protection to keep freedom of expression from being “eviscerated,”²⁹ the Court was unwilling to burden the lower courts with a voyage toward an “uncertain destination.”³⁰ That uncertainty, the Court said, would be a natural result of forcing lower courts to do a case-by-case analysis of whether subpoenas directed at reporters should be enforced.³¹ The Court noted that a qualified privilege would also hinder a grand jury’s efforts to find the truth and bring criminals to justice.³² The majority also found no basis for granting journalists a right that other citizens did not enjoy when called to provide relevant evidence to a grand jury.³³

In what has turned out to be a pivotal concurring opinion, however, Justice Lewis Powell felt it necessary to emphasize the narrowness of the majority opinion.³⁴ While the majority opinion found that journalists had no First Amendment right to refuse to testify to grand juries when they had witnessed crimes or received confessions and the grand juries were investigating specific crimes,

28. *Branzburg* was a consolidation of four cases involving three reporters who had declined to reveal confidential sources to grand juries. Paul Branzburg of the Louisville, Kentucky *Courier-Journal* had been subpoenaed by two grand juries in that state after he wrote stories about drug dealers and users. *Id.* at 667–70. Kentucky’s highest court twice rejected his attempts to quash the subpoenas, finding that the state shield law did not apply to eyewitness accounts of criminal activity. See *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970). Paul Pappas, a New England television reporter, spent several hours with members of the Black Panthers in their headquarters in New Bedford, Massachusetts, after a racial disturbance in that city but never filed a story. *Branzburg*, 408 U.S. at 672. Nevertheless, he was subpoenaed by a grand jury investigating Black Panther activities, and the Massachusetts Supreme Judicial Court found that he was not protected by any state common-law privilege. *Id.* at 673–74; see also *In re Pappas*, 266 N.E.2d 297 (Mass. 1971). Earl Caldwell, a *New York Times* reporter based in California, was subpoenaed by a grand jury investigating the Black Panthers, whose national headquarters was in Oakland. *Caldwell v. United States*, 434 F.2d 1081, 1084 (9th Cir. 1970). Caldwell regularly covered the group’s activities. *Id.* In *Caldwell*, the U.S. Court of Appeals for the Ninth Circuit eventually ruled in his favor, finding that he should not have to appear before the grand jury because of a First Amendment privilege. *Branzburg*, 408 U.S. at 679; see also *Caldwell*, 434 F.2d at 1086.

29. *Branzburg*, 408 U.S. at 681.

30. *Id.* at 703.

31. *Id.* at 703–05.

32. *Id.* at 686–90.

33. *Id.* at 703–05.

34. *Id.* at 709 (Powell, J., concurring).

Justice Powell said that if a journalist was harassed or her testimony would have no relevance to the investigation, she could seek relief in the courts.³⁵

Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, filed a dissent.³⁶ According to the dissent, in order to protect the free flow of information to the public and to keep reporters from being “annexed” as government investigators,³⁷ the government should have to show that it had a compelling need for a journalist’s information; that the information was relevant to the case; and that the information was not available elsewhere.³⁸ In a separate dissent, Justice William O. Douglas argued that journalists should enjoy an absolute privilege protecting them from government subpoenas.³⁹

The Court’s majority, concurring, and dissenting opinions largely focused on whether journalists had any First Amendment right to refuse to cooperate with otherwise valid grand jury investigations. The majority noted vaguely that newsgathering had “some” First Amendment protection,⁴⁰ but not to the extent of excusing journalists from the duties demanded of all citizens to provide relevant evidence to criminal investigations.⁴¹ The dissenters suggested that denying journalists the First Amendment right to protect the identities of confidential sources would lead to an infringement of free expression. Justice Stewart’s dissent constructed a logical syllogism: if there was no privilege, at least some sources with information important to the public interest would refuse to share it with reporters. If that happened, stories based on that information would never be published and the free flow of information to the public would be cut off, literally, at the source.⁴² Justice Douglas, in arguing for a virtually absolute privilege, focused on the chilling effect that a lack of privilege would have on both sources and journalists, decreasing the press’s ability to check abuses of government power.⁴³

Both dissenting opinions alluded to or foreshadowed various

35. *Id.* at 709–10.

36. *Id.* at 725–52 (Stewart, J., dissenting).

37. *Id.* at 725.

38. *Id.* at 743.

39. *Id.* at 712–13 (Douglas, J., dissenting).

40. *Id.* at 681 (majority opinion).

41. *Id.* at 690.

42. *Id.* at 728 (Stewart, J., dissenting).

43. *Id.* at 721 (Douglas, J., dissenting).

theories about freedom of speech and the press that were popular in the second half of the twentieth century. Justice Stewart's concern for the free flow of information to the public suggested traces of both Alexander Meiklejohn's self-government theory⁴⁴ and its corollary: the idea that the press and public have a "right to know."⁴⁵ Meiklejohn is famous for suggesting that free speech and self-government are inexorably linked because so many decisions in a democracy require wise voters to make wise decisions, which can only happen if voters are fully aware of all the pros and cons regarding public issues and public officials.⁴⁶ The "right-to-know" corollary suggests that the press needs access to government-held information so that it can inform the public of what its government is doing.⁴⁷

Both the Stewart and Douglas dissents, with their emphases on preserving press autonomy so that the press can act as a check on government power, foreshadowed Professor Vincent Blasi's "checking value" theory.⁴⁸ A few years after *Branzburg*, Blasi argued that a primary purpose of the First Amendment's speech, press, assembly, and petition clauses is to provide the press and public with the means to check government power.⁴⁹ The link between the *Branzburg* dissents and Blasi's theory is clearer in light of a speech made by Justice Stewart in 1974, shortly after the Watergate scandal led to President Richard Nixon's resignation. Justice Stewart argued that the press should properly be thought of as a "Fourth Estate" with a distinct institutional role as a watchdog over the three official branches of government.⁵⁰ He did not suggest that the press should therefore always win its battles with government over access or privilege issues, but rather argued that the press clause gave the press the right to challenge government.⁵¹

While much of the pro-privilege argument shows up in the *Branzburg* dissents, either directly or as subtext, it is worthwhile to

44. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 3 (1948).

45. See, e.g., Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1.

46. MEIKLEJOHN, *supra* note 44, at 26-27.

47. See generally Emerson, *supra* note 45; see also KENT COOPER, *THE RIGHT TO KNOW* 16-17 (1956).

48. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

49. *Id.*

50. Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 634 (1975).

51. *Id.* at 636.

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note that the majority opinion did not leave the press entirely helpless. Justice Byron White, writing for himself and on behalf of Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, and William Rehnquist, noted that Congress was free to create a statutory journalist's privilege and the states were free to do likewise.⁵² The Court also noted that state courts were free to interpret their own constitutions as they saw fit to recognize such a privilege.⁵³

Largely missing from the discussion of any possible basis for a journalist's privilege was mention of whether a privilege might be recognized at common law. In at least three instances, Justice White's majority opinion cited the lack of any recognition of a journalist's privilege in common law to support the majority's view that such a privilege is not favored or necessary.⁵⁴ There was no suggestion that one possible source of relief for journalists could be a privilege recognized at common law, but neither was there a direct statement barring such a privilege.

A. *State Privilege Law*

In subsequent years, protections for journalists and their sources have come in a variety of forms in both state and federal jurisdictions. At present, thirty-one states and the District of Columbia provide statutory protection to journalists,⁵⁵ while New

52. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

53. *Id.*

54. *Id.* at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."); *id.* at 693 ("The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."); *id.* at 698 ("As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958.").

55. See ALA. CODE § 12-21-142 (2005); ALASKA STAT. §§ 09.25.300-.390 (2006); ARIZ. REV. STAT. ANN. § 12-2237 (2003 & Supp. 2006); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (West 1995 & Supp. 2007); COLO. REV. STAT. § 13-90-119 (2005 & Supp. 2006); CONN. GEN. STAT. § 52-146t (Lexis 2007); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1999 & Supp. 2006); D.C. CODE §§ 16-4701 to -4704 (2005); FLA. STAT. § 90.5015 (1999 & Supp. 2007); GA. CODE ANN. § 24-9-30 (1995 & Supp. 2006); 735 ILL. COMP. STAT. §§ 5/8-901 to -909 (2003 & Supp. 2006); IND. CODE ANN. §§ 34-46-4-1 to -2 (1999 & Supp. 2006); KY. REV. STAT. ANN. § 421.100 (West 2005); LA. CODE EVID. ANN. arts. 1451-1459 (West 1999 & Supp.

Mexico accomplishes the same thing with a formal court rule.⁵⁶ Although the degree of protection varies considerably, it is safe to say that all of the statutes, or “shield laws,” provide at least qualified protection to journalists seeking to protect the identities of confidential sources. About two-thirds of the statutes also protect a journalist’s work product, such as unpublished photographs, notes, audio tapes, or video outtakes.⁵⁷

In the eighteen states without shield laws, most recognize either a constitutional privilege or a common-law privilege.⁵⁸ Appellate courts in three states—Mississippi,⁵⁹ Utah,⁶⁰ and Wyoming—have not considered the question. Hawaii appellate courts have not considered the question since eleven years before *Branzburg* was decided.⁶¹ Texas appellate courts have found no

2005); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2006); MICH. COMP. LAWS § 767.5a (2000 & Supp. 2006); MINN. STAT. §§ 595.021-.025 (2006); MONT. CODE ANN. §§ 26-1-901 to -903 (2006); NEB. REV. STAT. §§ 20-144 to -147 (1999); NEV. REV. STAT. § 49.275 (2006); N.J. STAT. ANN. §§ 2A:84A-21 to -21.13 (West 1994 & Supp. 2006); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 2007); N.C. GEN. STAT. § 8-53.11 (2005); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04, .12 (West 2006); OKLA. STAT. tit. 12, § 2506 (1993 & Supp. 2007); OR. REV. STAT. §§ 44.510-.540 (2003 & Supp. 2006); 42 PA. CONS. STAT. ANN. § 5942 (West 2000 & Supp. 2006); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1997 & Supp. 2006); S.C. CODE ANN. § 19-11-100 (Supp. 2006); TENN. CODE ANN. § 24-1-208 (2000 & Supp. 2006).

56. N.M. RULES ANN. § 11-514 (2005).

57. See *supra* note 55, with regard to statutes in California, Colorado, Connecticut, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee.

58. See, e.g., *In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985) (state and federal constitutions); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977) (state constitution); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978) (federal constitution); *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988) (common law); *State ex rel. Classic III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (federal constitution); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (state constitution); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) (federal constitution); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974) (federal constitution); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1978) (common law); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978) (state and federal constitutions).

59. But see JAMES C. GOODALE, 3 COMMUNICATIONS LAW 2006, at 1085-86 (PRACTISING L. INST., ed. 2006) (noting that Mississippi trial courts had recognized a qualified journalist’s privilege in unreported cases).

60. But see Edward L. Carter, Note and Comment, *Reporter’s Privilege in Utah*, 18 BYU J. PUB. L. 163 (2003) (discussing trial court decisions in Utah that have recognized a journalist’s privilege grounded in the First Amendment).

61. *In re Goodfader’s Appeal*, 367 P.2d 472 (Haw. 1961) (rejecting journalist’s attempt to quash subpoena).

privilege exists when reporters are subpoenaed in criminal cases.⁶² In civil cases, the law in that state is unclear.⁶³ Several of the states without shield laws have extended the journalist's privilege to cover nonconfidential material,⁶⁴ while others have specifically rejected that extension.⁶⁵

Among the states without shield laws, Massachusetts and Washington have been the most direct in attributing journalists' protection to the common law, while most other states have cited state or federal constitutional concerns.⁶⁶ In 1985, the Massachusetts Supreme Judicial Court declined a task force recommendation that it adopt a press shield as a court rule, saying that it preferred to allow protections for the media to develop through precedent.⁶⁷ The court said that the evolution of a journalist's privilege through common-law development would be more likely to be "flexible enough" to maintain a proper balance between the public interest in free expression and fair adjudication than adoption of a rule.⁶⁸ The court noted that "[t]he common law process will result in less static and dogmatic principles" than would be likely with a court-adopted rule.⁶⁹ In subsequent cases, the Massachusetts Supreme Judicial Court recognized a common-law, qualified journalist's privilege in several cases.⁷⁰

62. *Burnette v. State*, No. 01-00-00403-CR, 2001 Tex. App. LEXIS 3944 (Tex. App. June 14, 2001); *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc); *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994).

63. *See In re Union Pac. R.R. Co.*, 6 S.W.3d 310 (Tex. App. 1999) (finding television station could not claim a privilege for nonconfidential outtakes of video shot at scene of accident and subpoenaed in civil case but leaving open question of whether confidential information would be privileged in similar circumstances).

64. *See Bell v. City of Des Moines*, 412 N.W.2d 585 (Iowa 1987); *Lamberto v. Bown*, 326 N.W.2d 305 (Iowa 1982); *State ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989); *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995).

65. *See State v. Salsbury*, 924 P.2d 208 (Idaho 1996); *In re Letellier*, 578 A.2d 722 (Me. 1990); *State v. Hohler*, 543 A.2d 364 (Me. 1988); *Comm. v. Corsetti*, 438 N.E.2d 805 (Mass. 1982); *CBS Inc. (KMOX-TV) v. Campbell*, 645 S.W.2d 30 (Mo. Ct. App. 1982).

66. *See* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 258-64 (2002).

67. *Promulgation of Rules Regarding the Protection of Confidential News Sources*, 479 N.E.2d 154, 156 (1985).

68. *Id.* at 158.

69. *Id.*

70. *Comm. v. Tam S. Bui*, 645 N.E.2d 689 (Mass. 1995); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988). *But see Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d

In 1982, the Washington Supreme Court recognized a common-law journalist's privilege⁷¹ and provided a relatively detailed roadmap of how it reached its decision.⁷² In *Senear v. Daily Journal-American*,⁷³ the Washington Supreme Court first noted that a journalist's privilege was not favored in the common law. The court cited evidence law scholar John Henry Wigmore for the proposition that any privilege established by a court of law must meet four conditions:

(1) The communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.⁷⁴

The court concluded that the first two conditions existed in regard to a journalist's privilege.⁷⁵ As for the third condition, the court said that, while it might not have existed in earlier times, "it does exist with considerable force today."⁷⁶ The court said that the complex nature of modern society, the need for an informed citizenry, and "the increasing importance of journalists to convey information to citizens" meant that the relationship between journalists and sources was one that should be "sedulously fostered."⁷⁷ As for Wigmore's fourth condition, the court spent little time determining that, with respect to civil litigation at least, the injury from failing to establish the privilege would be greater than any benefits from requiring reporters to testify.⁷⁸

Later, the court reflected upon the nature of the common law. It is not, the court said, a set of unchanging doctrines:

667 (Mass. 2005) (upholding default judgments against newspaper and reporter for refusing to reveal confidential source to plaintiff in libel and privacy action), *cert. denied by* *Globe Newspaper Co. v. Ayash*, 126 S. Ct. 397 (2005).

71. *Senear v. Daily Journal-American*, 641 P.2d 1180, 1180 (Wash. 1982).

72. *Id.* at 1181-84.

73. *Id.*, 641 P.2d 1180.

74. *Id.* at 1182 (citing 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)).

75. *Id.* at 1183.

76. *Id.*

77. *Id.* (citing *Haugland v. Smythe*, 169 P.2d 706 (Wash. 1946)).

78. *Id.* at 1183.

It is a living, vital body of law which should address the problems of the day. When long standing rules of court and the administration of justice no longer have merit, they should be changed. The flexibility of the common law allows the law, by the action of the court, to change. All of the conditions we have held necessary for establishing a common law qualified privilege exist. The time has come to change and we do so.⁷⁹

It should be noted, however, that this was not a unanimous decision. One justice on the Washington Supreme Court argued that the court should have recognized a privilege grounded in the First Amendment.⁸⁰ Two justices dissented, arguing that if such a privilege were to be created, it was up to the legislature to do so.⁸¹ The difference of opinion on the Washington Supreme Court is a microcosm of the difference of opinion generally about the origins of the journalist's privilege.

B. Federal Privilege Law

By contrast to the two states that have specifically adopted common-law journalist's privileges, federal courts that have alluded to a common-law journalist's privilege have been largely silent on how and why they determined its origins. Most federal appellate courts have found that a privilege protecting journalists from revealing confidential sources exists.⁸² Most of those courts have grounded the journalist's privilege in the First Amendment, but others have suggested that the privilege is a creation of common law.⁸³ Only the U.S. Court of Appeals for the Sixth Circuit has rejected the existence of any type of journalist's privilege in federal law.⁸⁴ The Seventh Circuit more recently rejected the existence of a privilege covering work product and questioned other courts' finding of a privilege for confidential material but did not decide

79. *Id.* at 1184 (citations omitted).

80. *Id.* at 1184–85 (Utter, J., concurring).

81. *Id.* at 1185 (Rosellini, J., dissenting).

82. *See, e.g.,* Bruno & Stillman, Inc., v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); LaRouche v. Nat'l Broad. Corp., 780 F.2d 1134 (4th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986).

83. *See, e.g.,* United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).

84. *In re* Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987).

that question.⁸⁵ The Second, Third, and Ninth circuits have recognized a privilege that extends to work product in certain situations,⁸⁶ while the Fifth, in addition to the Sixth and Seventh, has rejected such an extension.⁸⁷

Particularly in the federal system, it may be folly to attempt to treat constitutional and common-law privileges as separate entities. Common law is often described as “judge-made law” that is created by case decisions and extended through precedent.⁸⁸ That is also a fairly accurate description of the way constitutional law develops. In fact, some commentators have suggested that the Constitution is largely a product of common-law thinking, particularly in the way that it describes judicial power in Article III.⁸⁹ For the moment, at least, it is useful to note that whatever similarities exist in common-law and constitutional law decision making do not necessarily mean that both are equal as *sources* of law.

The U.S. Court of Appeals for the Third Circuit has been the most direct and specific federal appellate court in grounding a journalist’s privilege in common law. In *Riley v. City of Chester*,⁹⁰ a Third Circuit panel determined that a lower court erred in finding a reporter in contempt for refusing to reveal her sources to a plaintiff in a civil action in which the reporter was not a party.⁹¹ The decision came only a few years after the adoption of the Federal Rules of Evidence, including FRE 501 regarding privileges.⁹² The court in *Riley* determined that FRE 501’s guidance to courts to act in regard to “reason and experience” in developing privilege law should initially lead to the First Amendment.⁹³ The court determined that *Branzburg*’s suggestion that the First Amendment protected newsgathering⁹⁴ and the obvious links between effective newsgathering, confidential sources, and an

85. *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

86. *See Gonzales v. Nat’l Broad. Corp.*, 194 F.3d 29 (2d Cir. 1999); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *United States v. Cuthbertson*, 630 F.2d 139, 146–47 (3d Cir. 1980).

87. *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

88. *See JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 10 (2003).

89. *Id.* at 18–19.

90. 612 F.2d 708 (3d Cir. 1979).

91. *See id.*

92. *See infra* Part III.

93. *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979).

94. *See supra* note 40 and accompanying text.

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informed public weighed in favor of the privilege.⁹⁵ The court also noted that, while it did not have to follow state law in a federal-question case, it could not ignore the Pennsylvania public policy decision to create a shield law.⁹⁶ The court determined that the strong public policy supporting “the unfettered communication to the public of information, comment and opinion” and the First Amendment aspects of the policy led it to recognize a qualified journalist’s privilege.⁹⁷

A year later, the U.S. Court of Appeals for the First Circuit cited *Riley* approvingly in finding that a lower court needed to revise its formula for determining whether a libel defendant newspaper must disclose confidential sources to the plaintiff.⁹⁸ The court said that the resolution of the dispute did not “lie in any black letter pronouncement or broad scale confrontation between First Amendment and reputation interests.”⁹⁹ This would seem to suggest that with no statutory guidance and no need to resort to a constitutional showdown, the answer to the privilege question lay in the common law. But the court then suggested that the proper solution to the issue at hand would be an application of federal civil procedure rules coupled with a “heightened sensitivity” to First Amendment implications of compelling disclosure.¹⁰⁰ While this might be characterized as a common-law approach, it would appear to more closely resemble a constitutional-law approach.

Two other circuits have alluded to the common law as the basis of a journalist’s privilege, one prior to the adoption of FRE 501 in 1975 and the other immediately after. In the 1972 case *Baker v. F & F Investment*,¹⁰¹ the Second Circuit ruled in favor of a reporter trying to avoid discovery of his confidential sources in a civil rights lawsuit in which he was not a party.¹⁰² The panel seemed to anticipate FRE 501 when it said that federal courts, absent a statutory journalist’s privilege, should look to judicial precedent (experience) and “a well-informed judgment as to the proper

95. *Riley*, 612 F.2d at 714–15.

96. *Id.* at 715 (citing *In re Taylor*, 193 A.2d 181 (Pa. 1963), and alluding to 42 PA. CONST. STAT. ANN. § 5942 (1976)).

97. *Id.*

98. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980).

99. *Id.*

100. *Id.*

101. 470 F.2d 778 (2d Cir. 1972).

102. *See id.*

federal public policy” affecting each case (reason).¹⁰³ The court also noted approvingly that the trial judge considered the public policy of New York, where the reporter lived, and Illinois, the forum state for the underlying civil rights action, both of which had adopted statutory journalist’s privileges.¹⁰⁴ But later in the opinion, the court closely ties the privilege to the First Amendment rather than the common law.¹⁰⁵

In the 1975 case *Lewis v. United States*,¹⁰⁶ the Ninth Circuit held that a reporter could not withhold evidence from a federal grand jury investigating crimes.¹⁰⁷ The court determined that *Branzburg* would make it difficult, at best, to argue for a common-law privilege that would protect a reporter subpoenaed by a grand jury.¹⁰⁸

In short, journalists have found limited protection for their sources—and themselves—in a hodge-podge of constitutional, statutory, and common-law locations. In the federal system, however, the constitutional protection is uneven and the statutory protection is unavailable so far.¹⁰⁹ Could the common law of evidence provide a basis for a more consistent federal privilege recognized by the Supreme Court? Perhaps, but first, the Court would have to determine the meaning of FRE 501 in this context.

III. RULE 501

American journalists have been arguing for about as long as there have been reporters that they should not have to reveal their sources.¹¹⁰ That history is relatively short compared to the length of time that judges in England and the United States have required people with relevant evidence to provide it to courts of law.

103. *See id.* at 781.

104. *Id.* at 781–82.

105. *Id.* at 785. “It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither” *Id.*

106. 517 F.2d 236 (9th Cir. 1975).

107. *See id.*

108. *Id.* at 238.

109. *See infra* notes 384–399 and accompanying text (regarding proposed federal shield law).

110. *See* Aaron David Gordon, Protection of News Sources: The History and Legal Status of the Newsman’s Privilege (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with Herman B. Wells Library, Indiana University) (tracing instances of journalists resisting subpoenas back to the mid-1800s).

Wigmore writes that the English tradition of compelling witnesses dates to at least 1742, when apparently the question of whether recalcitrant witnesses could be forced to testify became a matter of public debate.¹¹¹ Wigmore quotes Lord Hardwicke as saying in Parliament “that the public has a right to every [person’s] evidence.”¹¹²

There also is a long history of people trying to escape the obligation to provide evidence for professional or personal reasons. Wigmore noted that until the practice was effectively outlawed in the eighteenth century, British courts often excused as witnesses people who claimed they had “obligations of honor” to keep confidences.¹¹³ In both England and this country, efforts have been made for many years through statutes and common-law development to balance the needs of courts and recalcitrant witnesses through privileges. Wigmore, after stating his four-part test for the recognition of privileges,¹¹⁴ also expressed a disdain for most privileges created by statute or common law as impediments to the discovery of truth through litigation.¹¹⁵

But over time, privileges have developed through common and statutory law in all or most states to protect relationships between medical doctors and patients,¹¹⁶ psychotherapists and patients,¹¹⁷ and, in a few states, even accountants and clients,¹¹⁸ in addition to the widely recognized privileges for attorneys and clients,¹¹⁹ clergy and penitents,¹²⁰ and spouses.¹²¹

Given the conflict between the need for evidence and the ways in which privileges have developed, it is perhaps not surprising that one commentator has said that “[t]he law of evidence in the United States is probably the most complex, maddening, and rule-bound in the entire world.”¹²² There is probably a great deal of truth to that, but Congress made an attempt to bring order to

111. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961, Supp. 2005).

112. *Id.*

113. *Id.* § 2286.

114. *Id.* § 2285.

115. *Id.* § 2286.

116. *Id.* §§ 2380–2391.

117. *Id.*

118. *Id.* § 2286.

119. *Id.* §§ 2290–2329.

120. *Id.* §§ 2394–2396.

121. *Id.* §§ 2332–2341.

122. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 266 (2002).

chaos by codifying federal evidence rules in 1975.¹²³ FRE 501, on privileges, states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.¹²⁴

As Edward J. Imwinkelried noted in summarizing the history of FRE 501, it was the result of a political compromise in Congress.¹²⁵ FRE 501 replaced a set of specific rules regarding privilege that were in the text of a Supreme Court Advisory Committee report that raised Congress's concern in the midst of the Watergate scandal, which drew attention to executive privilege issues.¹²⁶ In providing a more open-ended framework for privilege law, FRE 501 gives federal courts the power to define the boundaries of privilege law but "is devoid of even a suggestion as to how the courts are to exercise that power."¹²⁷

According to Imwinkelried, the text of FRE 501 leaves open the possibility that courts will interpret the rule to either *foreclose* the development or expansion of privileges or *encourage* such development or expansion.¹²⁸ Imwinkelried contends that the context of FRE 501, among other evidence rules that favor admission of evidence, argues against both interpretations and toward an interpretation of FRE 501 that would allow new or expanded privileges, but only after a very cautious analysis by the

123. Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

124. FED. R. EVID. 501.

125. Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 514 (1994).

126. *Id.* at 512-14.

127. *Id.* at 515.

128. *Id.* at 524, 529-30.

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court.¹²⁹

FRE 501 is not without its critics, many of whom have suggested that it maintains a status quo full of “confusion and frustration”¹³⁰ and fails to establish a “procedural methodology” or “substantive policy” for the courts with regard to analyzing privilege claims.¹³¹ Federal appellate case law since FRE 501’s adoption would seem to bear out Imwinkelried’s observation that there are at least two ways to interpret FRE 501: restrictively and expansively.¹³²

129. *Id.* at 542–43.

130. See Kenneth R. Tucker, Note, *Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications?*, 72 U. DET. MERCY L. REV. 181, 204–06 (1994).

131. See M. Leigh Svetanics, Note, *Beyond “Reason and Experience:” The Supreme Court Adopts a Broad Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 41 ST. LOUIS U. L.J. 719, 720 (1997).

132. See, e.g., *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (finding that governor’s chief legal counsel could claim attorney-client privilege in connection to criminal investigation of governor); *In re Sealed Case* (Med. Records), 381 F.3d 1205 (D.C. Cir. 2004) (vacating district court discovery order until that court determines whether records of man committed to state care contain privileged mental-health files); *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (declining to create privilege for medical records at common law but finding that privacy interests outweigh government’s interest in late-term abortion records); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003) (finding that trial court erred in allowing defendant’s psychiatrist to testify and declining to create “dangerous patient” exception to psychotherapist-patient privilege, but finding that error was harmless because defendant was acquitted on charge relevant to psychiatrist’s testimony); *United States v. Espino*, 317 F.3d 788 (8th Cir. 2003) (finding that spousal privilege did not prevent defendant’s wife from voluntarily testifying against defendant); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000) (finding there is no “dangerous patient” exception to federal psychotherapist-patient privilege and affirming lower court’s quashing of subpoena for psychiatrist); *Pearson v. Miller*, 211 F.3d 57 (3d Cir. 2000) (declining to recognize “novel” privileges that would protect agency records about juveniles even though such privileges were part of state law); *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71 (1st Cir. 1999) (holding that psychotherapist-patient privilege should be construed to contain “crime-fraud exception” and affirming lower court order to have psychiatrists testify to grand jury); *In re Medtronic, Inc.*, 184 F.3d 807 (8th Cir. 1999) (finding that federal law protecting records of pacemaker manufacturer that identify patients did not illegally create a new privilege); *United States v. Schwensow*, 151 F.3d 650 (7th Cir. 1998) (finding that Alcoholics Anonymous telephone operators were not privileged in communications with defendant); *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (holding that White House counsel cannot claim attorney-client privilege in relation to criminal investigation of government officials); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (holding that White House may not claim attorney-client privilege in regard to grand jury investigation of government officials); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir.

IV. COURT INTERPRETATIONS OF FRE 501

By and large, the Supreme Court has been reluctant to create new privileges under FRE 501, but it also has not rushed to limit privileges already recognized. So, for example, in *University of Pennsylvania v. Equal Employment Opportunity Commission*,¹³³ the Court declined to create a privilege for colleges' peer review materials related to faculty tenure decisions.¹³⁴ The Court said it was "disinclined" to exercise its FRE 501 authority "expansively" and suggested that the creation of the privilege that the university sought was a "legislative function."¹³⁵ This opinion seems to be in line with an earlier decision declining to recognize a "legislative acts" privilege for a state legislator accused of misusing his office.¹³⁶ In that decision, the Court took note of the legislative history of FRE 501 and stated that no one had suggested the kind of privilege the legislator sought before the specific privilege recommendations were abandoned in favor of FRE 501.¹³⁷ While this fact was not dispositive, the Court said, it did highlight the fact that the legislative function test "was not thought to be either indelibly ensconced in our common law or an imperative of federalism."¹³⁸

But when a privilege was "ensconced in our common law," the Court was reluctant to let it be nibbled upon. In a 1998 case, *Swidler & Berlin v. United States*,¹³⁹ the Court determined that the attorney-client privilege should survive the death of the client.¹⁴⁰ It turned back an attempt by an independent counsel to pierce the shield around Clinton aide Vince Foster's conversation with his attorney nine days before Foster's suicide.¹⁴¹ The Court noted that the attorney-client privilege is "one of the oldest recognized privileges in the law" and that it was being asked to narrow it in a

1993) (declining to recognize common-law "scholar's privilege" for student subpoenaed by grand jury); *In re Grand Jury Subpoena Dtd.* Jan. 4, 1984, 750 F.2d 223 (2d Cir. 1984) (same); *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977) (finding that spouse could voluntarily testify against husband without violating husband's rights as long as testimony was limited to observations and not communication).

133. 493 U.S. 182 (1990).

134. *See id.*

135. *Id.* at 189.

136. *See United States v. Gillock*, 445 U.S. 360 (1980).

137. *Id.* at 367-68.

138. *Id.*

139. 524 U.S. 399 (1998).

140. *See id.*

141. *Id.* at 401-03.

way contrary to case law.¹⁴² FRE 501 did not require that a privilege must exist untouched for all time once it was created, the Court said, but it did require a stronger showing than the Independent Counsel had made to overturn it.¹⁴³

Given the Court's embrace of custom and tradition in other privilege cases since the adoption of FRE 501, it is not easy to explain the Court's ruling in *Jaffee v. Redmond*.¹⁴⁴ But *Jaffee* offers perhaps the best hope for journalists wanting to persuade the Supreme Court to recognize a common-law privilege.

A. *Jaffee v. Redmond*

In 1996, the Supreme Court crafted a test that could be utilized by the federal courts to create federal common-law privileges.¹⁴⁵ The test requires an analysis of the importance of the public and private interests served by the privilege, measured against the public interest in forcing disclosure of evidence, and consideration of the extent to which the states had adopted a similar privilege through common or statutory law.¹⁴⁶ The majority held "that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."¹⁴⁷ The case, however, dealt with counseling sessions with a state licensed social worker and not a licensed psychotherapist.¹⁴⁸

In expanding the privilege to cover the licensed social worker, the Court looked at several factors to determine whether the privilege served important private and public interests.¹⁴⁹ First, the Court found it important that social workers provided a significant portion of the mental health services in the United States.¹⁵⁰ Secondly, it was significant that the services provided by social workers serve the same public goals as psychotherapists.¹⁵¹ Finally, the fact that a majority of states had provided privilege protection

142. *Id.* at 410.

143. *Id.* at 410–11.

144. 518 U.S. 1 (1996).

145. *Id.* at 9–14.

146. *Id.*

147. *Id.* at 15.

148. *Id.* at 5.

149. *Id.* at 15–16.

150. *Id.*

151. *Id.* at 16.

to licensed social workers within the framework of the psychotherapist privilege was another factor that weighed in favor of recognizing a privilege under FRE 501.¹⁵² Interwoven in the Court's dialogue on the extension of the privilege to licensed social workers was an economic argument.¹⁵³ If the Court limited the privilege to psychotherapists, then the protection for those seeking or needing counseling would be limited to those who could afford the services of the psychotherapists, thereby excluding large portions of society from the benefits of the privilege.¹⁵⁴

The Court rejected the lower court's balancing test.¹⁵⁵ The Court was very concerned with the negative impact that such a test could have in application.¹⁵⁶ In particular, the Court wanted those who sought counseling to be able to predict that their statements made in confidence would be excluded from federal proceedings without being subject to the whims of judges.¹⁵⁷ Thus, the Court held that a near-absolute privilege would be recognized to promote certainty in the application of the privilege.¹⁵⁸

Outside of the holding and these two clarifications, the Court did not see a need to fully define the parameters of the new privilege.¹⁵⁹ The Court did throw in one significant piece of dictum for future courts to decipher.¹⁶⁰ In footnote nineteen, the Court seemed to envision a dangerous patient exception to the near-absolute privilege that it had created.¹⁶¹ As for future privileges created under the auspices of *Jaffee*, the Court stated that it would be better to allow the courts creating the new privileges on a case-by-case basis to shape the details of the privilege in a similar manner.¹⁶²

The dissent in *Jaffee*, written by Justice Antonin Scalia, demonstrated a reluctance to create new privileges because of the

152. *Id.* at 16–17.

153. *Id.*

154. *Id.*

155. *Id.* at 17.

156. *Id.*

157. *See id.* at 17–18.

158. *Id.* “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Id.* at 18 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981)).

159. *Id.* at 18.

160. *Id.* at 18 n.19.

161. *Id.*

162. *Id.* at 18.

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public's need for evidence.¹⁶³ The dissent was very critical of the majority opinion's terse extension of the psychotherapist privilege to licensed social workers.¹⁶⁴ Justice Scalia likened this extension to an extension of the attorney-client privilege to accountants or tax advisors.¹⁶⁵ He was very uncomfortable with the level of training of social workers when compared with either psychotherapists or lawyers.¹⁶⁶

B. Jaffee's Progeny in the Lower Courts

The lower federal courts have utilized the *Jaffee* framework in a variety of ways. Some courts have taken an expansive view of the privilege and provided protection to counselors outside of the scope of the original *Jaffee* ruling. Other courts have been stricter when applying a psychotherapist privilege. Generally, what the majority in *Jaffee* envisioned would happen has occurred: further clarification and definition in the lower courts on a case-by-case basis.

1. Who Qualifies for the Psychotherapist Privilege

The privilege created in *Jaffee* extended to licensed psychologists, psychiatrists, and social workers.¹⁶⁷ One aspect of the scope of the privilege left unanswered by the *Jaffee* Court was who else might be covered by the psychotherapist privilege. Numerous subsequent cases have been litigated to help further define the scope of coverage for this privilege.¹⁶⁸

a. Marriage Counselors

The district court for the Eastern District of Wisconsin curiously extended the psychotherapist privilege to include marriage

163. See *id.* at 18–19 (Scalia, J., dissenting).

164. See *id.* at 20.

165. *Id.*

166. See *id.* at 28–30.

167. *Id.* at 15 (majority opinion).

168. See *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154 (9th Cir. 2001); *United States v. Schwensow*, 151 F.3d 650 (7th Cir. 1998); *Jane Student 1 v. Williams*, 206 F.R.D. 306 (S.D. Ala. 2002); *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105 (C.D. Cal. 2000); *EEOC v. St. Michael Hosp. of Franciscan Sisters*, No. 96-C-1428, 1997 U.S. Dist. LEXIS 11847 (E.D. Wis. Aug. 8, 1997); *Greet v. Zagrocki*, No. CIV. A. 96-2300, 1996 WL 724933 (E.D. Pa. Dec. 16, 1996).

counselors.¹⁶⁹ The case involved a suit brought by the Equal Employment Opportunity Commission (EEOC) on behalf of a woman who claimed that she was discriminated against because of her race.¹⁷⁰ The defendant employer sought discovery of the marriage counseling records of the woman and her husband to counter any claims that the woman's discharge was to blame for her marital problems.¹⁷¹ The court, with no discussion, declared that the marriage counseling records of the couple fell under the umbrella of the privilege created in *Jaffee*.¹⁷²

b. Employee Assistance Programs

As a result of the *Jaffee* decision, the U.S. District Court for the Eastern District of Pennsylvania in 1996 vacated an order that had forced disclosure of an Employee Assistance Program's (EAP) files pertaining to a police officer whose department was being sued because of the officer's actions.¹⁷³ The court, and not the police officer (who was not represented at the hearing), asserted the privilege and categorized it as a psychotherapist privilege on its own.¹⁷⁴ The party opposing the motion to compel did not specify which privilege was the basis for its objection.¹⁷⁵ The court focused on the sensitive nature of the counseling provided by the EAP and, with barely any discussion, lumped the EAP in with the psychotherapist privilege.¹⁷⁶

In 2001, the Court of Appeals for the Ninth Circuit in *Oleszko v. State Compensation Insurance Fund*¹⁷⁷ further elaborated upon the extension of the privilege to EAPs.¹⁷⁸ Specifically, the court answered the question of whether or not the privilege extends to unlicensed counselors of an EAP.¹⁷⁹ In deciding this question, the court looked to *Jaffee* for guidance.¹⁸⁰

169. See *St. Michael Hosp.*, 1997 U.S. Dist. LEXIS 11847, at *7.

170. *Id.* at *1.

171. *Id.* at *7.

172. *Id.* Although the court found that the records could be protected under the psychotherapist privilege, the privilege would have to be waived if the EEOC were to seek damages for harm to the woman's marriage. *Id.*

173. *Greet*, 1996 WL 724933, at *1.

174. *Id.*

175. *Id.*

176. See *id.*

177. 243 F.3d 1154 (9th Cir. 2001).

178. See *id.* at 1157–59.

179. *Id.* at 1157.

180. *Id.* at 1156–57.

EAPs, in the court's ruling, served the same public and private interests as social workers and therefore, using the same rationale, should be encompassed in the privilege.¹⁸¹ In particular, the court focused upon the "gateway" role that EAPs play in the treatment of mental health issues.¹⁸² To allow the documents and personnel of an EAP to be used in a courtroom would be to permit an end run around the privilege whenever an individual begins treatment with an EAP instead of directly with a psychotherapist.¹⁸³

In allowing the protection by privilege of communications with unlicensed employees of EAPs, the court distinguished the historical background of EAPs from the social workers involved in *Jaffee*.¹⁸⁴ EAPs were a rapidly growing area of the mental health field and as such were only beginning to be licensed by the states.¹⁸⁵ The court declined to penalize the clients of EAPs simply because EAPs are relative newcomers in the mental health field.¹⁸⁶

c. Licensed vs. Unlicensed Counselors

The *Oleszko* court's discussion of licensed versus unlicensed counselors in the EAP setting was not the only court opinion to weigh in on the issue of licenses and their impact on the existence of a privilege.¹⁸⁷ In *United States v. Lowe*,¹⁸⁸ the court ruled that communications with a rape counselor had some form of federal privilege in light of the *Jaffee* ruling.¹⁸⁹ But the *Lowe* court did not explore the parameters of such a privilege because it was unnecessary in the case before it.¹⁹⁰

The *Speaker v. County of San Bernardino*¹⁹¹ case in 2000 provided an additional wrinkle to the licensure debate.¹⁹² In the case, a licensed marriage, family, and child counselor (MFCC) met with a

181. *Id.* at 1157–58.

182. *Id.* at 1159.

183. *Id.* at 1158.

184. *Id.* at 1158 n.5.

185. *Id.*

186. *Id.* at 1158.

187. *See* *Jane Student 1 v. Williams*, 206 F.R.D. 306, 309–10 (S.D. Ala. 2002); *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996).

188. *Lowe*, 948 F. Supp. 97.

189. *Id.* at 99.

190. *Id.* at 100 (holding that whatever privilege existed was limitedly waived by the client for *in camera* review by the court).

191. 82 F. Supp. 2d 1105 (C.D. Cal. 2000).

192. *Id.*

San Bernardino police officer following a shooting incident.¹⁹³ The department arranged the sessions for the officer as part of its mandatory follow-up to a shooting incident.¹⁹⁴ The department told the officer that the sessions were confidential.¹⁹⁵

The court began by ruling that because the type of counseling performed was outside the scope of the license of the counselor, the communications were not covered by the *Jaffee* privilege.¹⁹⁶ Instead of focusing on this aspect of the case, the court turned to the understanding of the officer, who believed that the communications in question were confidential.¹⁹⁷ The court ruled that the officer's communications with the counselor were privileged because the officer reasonably believed that he was speaking to a licensed psychotherapist.¹⁹⁸ To support its ruling, the court looked to similar situations dealing with the attorney-client privilege, both in courts and in scholarly literature.¹⁹⁹

Courts have not always been so lenient in applying the psychotherapist privilege to unlicensed counselors.²⁰⁰ None of the courts previously mentioned in this section made reference to the oft quoted, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."²⁰¹ In *Jane Student 1 v. Williams*,²⁰² the court acknowledged this as a "bedrock principle of American jurisprudence."²⁰³ It was through this lens, rather than the more permissive perspectives of previous courts, that the *Jane Student 1* court rejected the application of the privilege to communications with an unlicensed counselor.²⁰⁴

Another rejected extension of the psychotherapist privilege involved volunteers from Alcoholics Anonymous.²⁰⁵ A criminal

193. *Id.* at 1107.

194. *Id.*

195. *Id.*

196. *Id.* at 1110–11.

197. *Id.* at 1112.

198. *Id.* at 1114.

199. *Id.* at 1112–13.

200. *See* United States v. Schwensow, 151 F.3d 650 (7th Cir. 1998) (holding that the defendant's statements to volunteers working at the office of an association for alcoholics were not protected by the psychotherapist-patient privilege).

201. United States v. Nixon, 418 U.S. 683, 710 (1974).

202. 206 F.R.D. 306 (S.D. Ala. 2002).

203. *Id.* at 309.

204. *Id.* at 310.

205. *See* Schwensow, 151 F.3d at 657.

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defendant sought to exclude testimony from the volunteers on the grounds that the communications were protected under the privilege.²⁰⁶ The court rejected that argument based on numerous considerations.²⁰⁷ The volunteers had no professional qualifications, did not behave in such a manner that they could be confused with a psychotherapist, did not work in an office that suggested that they provided mental health services, and did not speak with the defendant “for the purposes of diagnosis or treatment.”²⁰⁸ Taken as a whole, the unlicensed volunteers in this situation did not qualify under any expansive definition of psychotherapists.²⁰⁹

2. *Exceptions*

In addition to further clarifying who is eligible for protection under the federal psychotherapist privilege, the courts have also imported exceptions to the privilege from other, more established privileges such as the attorney-client privilege. The crime-fraud exception has been applied to the psychotherapist privilege in at least one circuit. Despite a near endorsement by the Supreme Court in *Jaffee*, there is a split among the federal circuits regarding the application of a dangerous patient exception.

a. *Crime-Fraud Exception*

Although the *Jaffee* court did not envision a qualified privilege, it did endorse the idea that exceptions to the privilege might be necessary.²¹⁰ In 1999, the Court of Appeals for the First Circuit borrowed the crime-fraud exception from the attorney-client privilege and applied it to the psychotherapist privilege.²¹¹ The exception applied “[o]nly when communications are intended directly to advance a particular criminal or fraudulent endeavor”²¹² In order to invoke the privilege, the party seeking its use

206. *Id.* at 656.

207. *Id.* at 656–57.

208. *Id.* at 657.

209. *Id.* at 656–57.

210. *See Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996).

211. *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 76–77 (1st Cir. 1999). The case involved a grand jury investigation into multiple crimes including bank fraud. Violette spoke with two psychotherapists “as part of a scheme to defraud lenders and/or disability insurers.” *Id.* at 78.

212. *Id.* at 77.

was required to make a prima facie showing that the exception should be applied.²¹³

b. Dangerous Patient Exception

In a footnote, the *Jaffee* court also seemed to open the door for a dangerous patient exception, but there is a split in the circuits as to its existence.²¹⁴ In *United States v. Glass*,²¹⁵ the Tenth Circuit created a dangerous patient exception when it ruled that an evidentiary hearing would be required to evaluate the seriousness of the threat and the necessity of the disclosure to avoid the harm.²¹⁶

Other courts have not followed the Tenth Circuit's lead.²¹⁷ In *United States v. Hayes*,²¹⁸ the Sixth Circuit stated that, although psychotherapists may disclose the existence of threats to third parties and testify at involuntary hospitalization proceedings, they did not have a duty to testify at either criminal or civil proceedings.²¹⁹ Similarly, the Ninth Circuit rejected a dangerous patient exception in *United States v. Chase*²²⁰ in 2003.²²¹

213. *Id.* at 78.

214. *Jaffee*, 518 U.S. at 18 n.19. Footnote nineteen reads:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Id.

215. 133 F.3d 1356 (10th Cir. 1998).

216. *Id.* at 1357. In the *Glass* case, Glass voluntarily sought mental health treatment from a psychotherapist. *Id.* During the treatment, Glass expressed a desire to shoot President Clinton and Hilary Clinton. *Id.* Glass was released from the facility upon the promise to continue outpatient treatment while living with his father. *Id.* When Glass moved out of his father's home ten days after being released, the doctor contacted local authorities who in turn contacted the Secret Service. *Id.* Glass was indicted for threatening the President, and the doctor's testimony was sought in connection with proving the threat. *Id.*

217. See *United States v. Chase*, 340 F.3d 978, 985 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000).

218. 227 F.3d 578.

219. *Id.* at 586. In *Hayes*, the government sought the testimony of a treating psychotherapist who had heard threats toward a federal official in the course of the treatment of Hayes. *Id.* at 583. The government, after the psychotherapist had disclosed the threat to a person at risk, brought charges against Hayes for threatening a federal official. *Id.* at 580–81.

220. 340 F.3d 978.

221. *Id.* at 992. In *Chase*, the defendant was treated by a psychiatrist for a variety of mental health ailments. *Id.* at 979. In the course of treatment, the

3. *Other Privileges*

The federal district courts have also not been shy in utilizing FRE 501 and the *Jaffee* framework to create new privileges. With the purpose of facilitating fair resolutions to conflicts between opposing parties, courts have recognized the need to create both a mediation privilege and a settlement privilege. These new privileges were more rooted in public policy than in the consensus among states as to their existence.

a. *Mediation Privilege*

In *Folb v. Motion Picture Industries Pension and Health Plans*,²²² a federal district court created a federal mediation privilege using the *Jaffee* framework.²²³ Like the *Jaffee* Court, the *Folb* court started from the basic tenet that privileges should not be lightly created.²²⁴ The *Folb* court utilized the *Jaffee* test to evaluate the legitimacy of a federal mediation privilege.²²⁵ After applying the test to the facts of the case, the court ruled that a federal mediation privilege did exist.²²⁶

The court followed the lead of *Jaffee* in creating the scope of the privilege, as well.²²⁷ The court declined to create a limited privilege that required a balancing test for application.²²⁸ The privilege protected communications revealed as part of a formal mediation with a neutral mediator.²²⁹ This included communications with the mediator, whether before or during the

defendant revealed to the psychiatrist a list of people whom the defendant had thought about harming that included two FBI agents with whom the defendant had dealings. *Id.* After speaking with her supervisor and legal counsel for her institution, the psychiatrist contacted the local police, who in turn contacted the FBI. *Id.* at 980. The defendant was charged with three counts, including threatening to kill the agents. *Id.* at 981.

222. 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

223. *Id.* at 1170–80.

224. *Id.* at 1171.

225. *Id.* Under this formulation, the court must ask:

(1) whether the asserted privilege is ‘rooted in the imperative need for confidence and trust[;]’ (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.

Id. (citation omitted).

226. *Id.* at 1179–80.

227. *Id.* at 1180.

228. *Id.*

229. *Id.*

proceeding, and communications with the other party during the mediation.²³⁰ It did not include negotiations outside of the mediation between the parties.²³¹

In the 2000 case of *Sheldone v. Pennsylvania Turnpike Commission*,²³² the District Court for the Western District of Pennsylvania followed the lead of *Folb* and recognized a federal mediation privilege.²³³ In defining the scope of the privilege, the court first looked to the District's local rules.²³⁴ Communications related to a mediation proceeding involving a neutral were protected.²³⁵ The limitation placed on the privilege by the court was that evidence that was independently discoverable would still be discoverable even though it was used as part of a mediation proceeding.²³⁶

In 2002, a U.S. bankruptcy court provided some specific examples of items protected by the mediation privilege as well as one significant exception.²³⁷ The court protected slides created for the mediation proceeding, memoranda of law presented to the neutral, as well as other memoranda submitted during the proceedings and correspondence between the parties and the mediator.²³⁸ The court drew the line, however, at materials prepared "well in advance of the mediation."²³⁹

b. Settlement Privilege

In 2003, the Sixth Circuit recognized a settlement privilege under FRE 501 and *Jaffee*.²⁴⁰ In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*,²⁴¹ the court sought to answer the question of whether a litigant could compel discovery of settlement negotiation

230. *Id.*

231. *Id.*

232. 104 F. Supp. 2d 511 (W.D. Penn. 2000).

233. *Id.* at 517.

234. *Id.*

235. *Id.* (citing W. Dist. Local R. 16.3.5(E), 16.3.1).

236. *Id.*

237. *See In re RDM Sports Group Inc.*, 277 B.R. 415, 431 (Bankr. N.D. Ga. 2002).

238. *Id.*

239. *Id.* The court provided no guidance on what "well in advance of the mediation" meant. *See id.* The excluded documents, however, were ones that had been disclosed to opposing counsel prior to the mediation. *Id.* at 422.

240. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-81 (6th Cir. 2003).

241. *Id.*

communications from another related case involving his or her opponent.²⁴² The court used an abbreviated *Jaffee* analysis in its decision that focused on the public interest promoted by the privilege and the history in the circuit of confidentiality of communications during settlement.²⁴³

The overriding concern of the court was the public policy issues that might arise if the privilege was not recognized.²⁴⁴ In particular, the court was concerned with the possible impairment of settlement negotiations if the communications within them were not considered confidential.²⁴⁵ In addition, the court called into question the veracity and reliability of statements made during settlement discussions.²⁴⁶ The scope of the privilege was simply “any communications made in furtherance of settlement.”²⁴⁷

C. *Summary of Analogous Case Law*

The *Jaffee* court explicitly rejected a qualified privilege for psychotherapists that would require a balancing test component in order for the privilege to be exercised.²⁴⁸ Instead, the Court crafted a privilege that provided a level of certainty in its protection of communications made to psychotherapists.²⁴⁹ Although the privilege was not absolute in the pure sense of the word, it was broad.²⁵⁰ The rule was that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected.”²⁵¹

The rule was quickly expanded upon in the *Jaffee* opinion to include licensed social workers.²⁵² Subsequent courts have further expanded the protected class covered by the *Jaffee* rule to include marriage counselors, EAPs, unlicensed rape counselors, and counselors whom the recipient of the services reasonably believed would qualify for the *Jaffee* privilege.²⁵³ Other courts have rejected

242. *Id.* at 979.

243. *Id.* at 980–81.

244. *Id.* at 980.

245. *Id.*

246. *Id.* at 981.

247. *Id.* at 983.

248. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

249. *Id.* at 17–18.

250. *Id.*

251. *Id.* at 15.

252. *Id.* at 15–17.

253. *See Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1159 (9th Cir. 2001)

the application of *Jaffee* to unlicensed mental health practitioners and Alcoholics Anonymous volunteers.²⁵⁴ The scope of what type of practitioners communications can be with for purposes of the psychotherapist privilege is still an open question that has seen some courts be very permissive in interpretation.²⁵⁵

Lower courts have also developed exceptions to the privilege.²⁵⁶ One court has imported the crime-fraud exception from the attorney-client privilege, while others have debated the existence of a dangerous patient exception despite a near endorsement of such an exception by the Supreme Court.²⁵⁷

Courts have also created new privileges under the *Jaffee* framework, including a federal mediation privilege and a federal settlement privilege.²⁵⁸ The mediation privilege protects communications related to proceedings before a neutral mediator.²⁵⁹ It does not protect subsequent communications nor does it protect communications that were prepared too far ahead of the time of the proceedings.²⁶⁰ Similarly, the settlement privilege protects communications made by parties when trying to resolve their dispute.²⁶¹ The settlement privilege, however, has a less formal feel because it does not require a formal proceeding to be

(EAPs); *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1114 (C.D. Cal. 2000) (person reasonably believes privilege applies); *Equal Employment Opportunity Comm'n v. St. Michael Hosp. of Franciscan Sisters*, No. 96-C-1428997, U.S. Dist. LEXIS 11847 at *7 (E.D. Wis. Aug. 8, 1997) (marriage counselors); *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996) (unlicensed rape counselors); *Greet v. Zagrocki*, No. 96-2300, 1996 WL 724933, at *2 (E.D. Pa. Dec. 16, 1996) (EAPs).

254. *See United States v. Schwensow*, 151 F.3d 650, 657 (7th Cir. 1998) (Alcoholics Anonymous volunteers); *Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002) (unlicensed mental health practitioners).

255. *See sources cited supra* note 253.

256. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 78 (1st Cir. 1999); *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998).

257. *See United States v. Chase*, 340 F.3d 978, 985 (9th Cir. 2003) (dangerous-patient); *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000) (dangerous-patient); *Violette*, 183 F.3d at 78 (crime-fraud); *Glass*, 133 F.3d at 1360.

258. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 977 (6th Cir. 2003) (settlement privilege); *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 517 (W.D. Penn. 2000) (mediation privilege); *Folb v. Motion Picture Indus. Pension and Health Plans*, 16 F. Supp. 2d 1164, 1179-80 (C.D. Cal. 1998) (mediation privilege); *In re RDM Sports Group Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002) (mediation privilege).

259. *Folb*, 16 F. Supp. 2d at 1180.

260. *Id.*

261. *Goodyear*, 332 F.3d at 977.

the focal point of the communications.²⁶²

V. FACTORS FAVORING A COMMON-LAW JOURNALIST'S PRIVILEGE

For journalists, *Jaffee* and its progeny offer hope because of the courts' embrace of state law as a guideline for federal privileges. One factor favoring a common-law journalist's privilege is the fact that nearly all of the states have recognized some sort of journalist's privilege by statute or by court ruling. As noted earlier, thirty-two states and the District of Columbia provide statutory or court-rule protection to journalists, and most of the other states recognize a common-law or constitutional privilege.²⁶³ While the degree of protection varies considerably, it is safe to say that all of the states that recognize some form of journalist's privilege provide at least qualified protection to journalists seeking to protect the identities of confidential sources.²⁶⁴

Federal law is not as helpful to journalists as state law, but the federal split on the privilege's existence, extent, and origin may work to journalists' advantage. In *Jaffee*, the Court noted that one reason for accepting the case was the fact that the federal appellate courts were split on whether such a privilege should be recognized.²⁶⁵

Given the widespread recognition of at least a qualified privilege for confidential material among the states and the conflict among federal appellate courts, journalists' case for a common-law privilege could be attractive to the Supreme Court under FRE 501 and *Jaffee*. Although lower courts have split in various directions in their interpretations of *Jaffee*, that decision has certainly not prevented lower courts from recognizing new privileges or extending *Jaffee* to related professionals.

As noted earlier, some federal appellate courts already have suggested that the common law is a source of protection for journalists.²⁶⁶ A more recent federal district court decision, although it did not stand up on appeal, still provides fodder for arguments in support of a common-law journalist's privilege.

262. *Id.*

263. *See supra* Part II.A.

264. *See id.*

265. *See Jaffee v. Redmond*, 518 U.S. 1, 7 (1996).

266. *See supra* Part II.B.

A. New York Times Co. v. Gonzales

In 2006, the United States Court of Appeals for the Second Circuit overturned a Southern District of New York ruling that had protected the phone records of a pair of *New York Times* journalists based upon both a constitutional and federal common-law journalist's privilege.²⁶⁷ The Circuit Court's basis for overruling the district court was that whatever privilege may have existed under the federal common law was overcome by the factual circumstances of the case.²⁶⁸ The Supreme Court declined to stay the Circuit Court's ruling.²⁶⁹ Despite the ruling of the Circuit Court and the Supreme Court's denial of a stay, the district court's opinion provides a good model for lawyers or judges who are seeking the recognition of a federal common-law journalist's privilege, particularly because the Second Circuit panel did not rule out the existence of a common-law privilege.²⁷⁰

In this case, the *New York Times* sought a declaratory judgment for protection of the telephone records of two *Times* reporters from subpoena by a federal special prosecutor.²⁷¹ The special prosecutor was seeking the records as part of a grand jury investigation into leaks by government officials to the two reporters of upcoming raids on two Islamic charities suspected of aiding terrorists.²⁷² The *Times* claimed that both the First Amendment and the federal common law protected the conversations of its reporters with confidential sources from disclosure to the grand jury.²⁷³

In order to decide whether the First Amendment protected the *New York Times*, the district court looked first to the one Supreme Court case on the topic, *Branzburg*.²⁷⁴ The *New York Times* court noted that this somewhat fractured opinion has resulted in a variety of interpretations of the decision by both courts and academics.²⁷⁵ Because of this variety of interpretations, the district court looked to the jurisprudence of its own circuit for the direction it should take in answering the question of whether the

267. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), *rev'g* 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *stay denied*, 127 S. Ct. 721 (2006).

268. *N.Y. Times*, 459 F.3d at 170.

269. *N.Y. Times*, 127 S. Ct. 721 (2006).

270. See *N.Y. Times*, 459 F.3d at 163.

271. *N.Y. Times*, 382 F. Supp. 2d at 464.

272. *Id.* at 466–68.

273. *Id.* at 467.

274. *Id.* at 484; *Branzburg v. Hayes*, 408 U.S. 655 (1972).

275. *N.Y. Times*, 382 F. Supp. 2d at 485–86.

New York Times and its reporters had a First Amendment claim of protection from the grand jury subpoena.²⁷⁶ The district court found that in the Second Circuit there is a qualified First Amendment journalist's privilege based upon *Branzburg*.²⁷⁷

As its common-law argument, the *New York Times* advocated the creation of a journalist's privilege under FRE 501 using the test fashioned by the Supreme Court in *Jaffee*.²⁷⁸ The district court ruled that there was a qualified federal common-law journalist's privilege under FRE 501 using the *Jaffee* test.²⁷⁹ What is most curious about the holding of the district court regarding the federal common-law journalist's privilege is that the privilege was qualified.²⁸⁰ The *Jaffee* Court created a non-qualified privilege in order to provide a level of certainty to those who might need its protection.²⁸¹ The district court chose a more uncertain path by recognizing a qualified privilege. The Second Circuit panel in *New York Times* noted that it agreed with the district court that any common-law journalist's privilege would be qualified.²⁸²

The *New York Times* district court used the *Petroleum Products*²⁸³ test to determine if the *New York Times* was eligible for protection under a combined First Amendment and federal common-law journalist's privilege.²⁸⁴ The *Petroleum Products* test required the government to make "a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."²⁸⁵ This test is part of the line of Second Circuit, *Branzburg*-related cases.²⁸⁶ There is no mention of common-law privilege cases and their scope as a potential source in *New York*

276. *Id.* at 486–90.

277. *Id.* at 490.

278. *Id.* at 492. The *Jaffee* test, as utilized in *New York Times*, is comprised of three factors: (1) would the privilege serve significant private interests, (2) would the privilege serve important public interests, and (3) would the significant private and public interests served by a privilege outweigh the evidentiary benefit if no privilege existed? *Id.* at 497–505. A fourth variable that could be used to support the creation of a privilege is the consensus of the States upon the existence of the privilege. *Id.*

279. *Id.* at 508.

280. *Id.* at 501.

281. *Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996).

282. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006).

283. *In re Petroleum Products*, 680 F.2d 5 (2d Cir. 1982).

284. *N.Y. Times*, 382 F. Supp. 2d at 510.

285. *Petroleum Products*, 680 F.2d at 7.

286. *See id.* at 7–8.

Times for defining the journalist's privilege recognized by the court.

It is worth noting that there was no unanimity on the Second Circuit panel that ultimately reversed the district court. In dissent, Judge Robert Sack wrote that he had "no doubt" that a common-law journalist's privilege had developed under FRE 501 since *Branzburg* was decided.²⁸⁷ Judge Sack suggested that a qualified journalist's privilege seemed "easily—even obviously—to meet" the *Jaffee* factors for recognition of a privilege: the serving of private and public interests that outweighed the evidentiary benefit of rejecting the privilege, and widespread recognition by the states.²⁸⁸

Other recent decisions also are notable for leaving a door open for a common-law privilege. For example, a federal district court in California refused to quash grand jury subpoenas for two *San Francisco Chronicle* reporters who published information from secret grand jury transcripts related to an investigation of steroid use in baseball.²⁸⁹ The court found that *Branzburg* required it to reject recognition of a common-law privilege in the grand jury context,²⁹⁰ but in the next sentence the court also said that even if it did recognize a privilege, it would be overcome in this case.²⁹¹ This suggests that the court still felt the need to go through a qualified privilege analysis even as it rejected the existence of the privilege in the case's particular fact situation. In the *Judith Miller* case,²⁹² the District of Columbia Circuit Court of Appeals judges agreed that *Miller* should be forced to testify to a grand jury investigating the public revelation of a CIA agent's identity.²⁹³ The judges, however, disagreed on the existence of a privilege. One judge dismissed the existence of a common-law privilege and suggested that the creation of such a privilege was a strictly legislative function.²⁹⁴ Another suggested that a common-law privilege might exist, but it was not necessary to determine that to decide this case.²⁹⁵ The third would recognize a common-law privilege that would require a showing of need, exhaustion of alternative sources, and a balancing of the public interest in disclosing the journalist's source versus the

287. *N.Y. Times*, 459 F.3d at 181 (Sack, J., dissenting).

288. *Id.*

289. *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

290. *Id.* at 1119.

291. *Id.*

292. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

293. *Id.* at 968.

294. *Id.* at 981 (Sentelle, J., concurring).

295. *Id.* at 984 (Henderson, J., concurring).

public interest in the reporter exposing the information to the public.²⁹⁶

If a court recognized that there was a common-law journalist's privilege, but not a First Amendment based privilege, where should the court look for guidance in defining the scope of the common-law privilege? In the era following the *Jaffee* decision, could *Jaffee* and its progeny provide some guidance to the courts in defining the scope of a common-law journalist's privilege?

B. Application of Analogous Case Law to a Journalist's Privilege

Reporters in cases such as *Branzburg* and *New York Times* have sought protection from revealing their sources for news stories to grand juries, be it directly or through related information. The communication itself is not confidential, since the reporter typically publishes it. The identity of the source, however, is the real confidential communication. This is different than the psychotherapist, mediation, or settlement communication where the identities of the parties are known, but the statements made and documents used are held in confidence and protected by privilege under FRE 501. If a lawyer wished to argue for a FRE 501 journalist's privilege independent of *Branzburg*, however, *Jaffee* and its progeny would provide analogous case law for helping shape the scope of the privilege.

In following *Jaffee*, the communications between the reporter and the source must be confidential. The communication must be in the course of the private and public justifications for allowing the privilege—in the case of reporters, the collection of information in order to distribute it for public consumption.

The most problematic aspect of the application of a journalist's privilege would be determining who qualifies for the privilege. The psychotherapist privilege has resulted in numerous cases and divisions in circuits as to who is covered, and the psychotherapist privilege does not have the same type of First Amendment concerns that creating a protected class for journalists would have.²⁹⁷ If a court were to utilize a *Jaffee*-style analysis of the scope of a journalist's privilege, the precedent would imply that the

296. *Id.* at 997–98 (Tatel, J., concurring).

297. *See Branzburg v. Hayes*, 408 U.S. 665, 704–05 (1972) (suggesting that recognition of a journalist's privilege would actually create a First Amendment conflict because courts would have to limit its reach to some speakers and not others).

court should evaluate the application of the privilege on a case-by-case basis, just as the Supreme Court did in *Jaffee* and lower courts have done in subsequent cases. Post-*Branzburg* case law, however, would be useful here. Circuit courts have developed a test for determining who may claim protection of a journalist's privilege by looking at the intent of the potential witness at the time the information being sought was gathered. In general, the circuits that have confronted the issue have determined that a "journalist" is someone engaged in investigative reporting who had the intent, at the time the disputed information was gathered, of disseminating it to the public.²⁹⁸

The importation of the crime-fraud exception and the dangerous patient exception into a journalist's privilege would be realistic possibilities. These exceptions did not originate as part of the psychotherapist privilege but instead were borrowed from other, already existing privileges. The justifications for having these exceptions most likely would carry over into a FRE 501 journalist's privilege. A court could also decide to do as the *Jaffee* Court did and leave the creation of exceptions to the lower courts in subsequent cases.

The mediation and settlement privileges could provide a backdrop for an expansive perception of a journalist's privilege. Both privileges protect communications and documents that were part of the protected proceedings and negotiations. It could therefore be argued that any communications and documents related to the confidential source could be protected so long as it is not done too far ahead of time.

While the *Jaffee* and the *New York Times* rulings both provide some hope to journalists in regard to the creation of a federal common-law privilege, other factors weigh against a common-law privilege, as the next section will discuss.

298. See *In re Madden*, 151 F.3d 125, 126 (3d Cir. 1998) (rejecting claim of talk-show host that he could seek protection under journalist's privilege); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (finding that nonfiction book author qualified for protection under journalist's privilege); *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987) (rejecting claim of book author for privilege protection because information was not gathered for purpose of dissemination but for personal reasons).

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VI. FACTORS WEIGHING AGAINST A COMMON-LAW JOURNALIST'S PRIVILEGE

If the *Jaffee* ruling gives hope to journalists that the Supreme Court would rule in their favor based on state support for the privilege and a desire to resolve a circuit split, it also creates obstacles.

The Court noted in *Jaffee* that its decision to uphold the psychotherapist privilege was reinforced by the fact that the committee whose recommendations led to FRE 501 originally had proposed that the psychotherapist privilege be among nine specific privileges recognized in federal law.²⁹⁹ As a recent commentator noted, a journalist's privilege was not among the nine specific privileges recommended before FRE 501 was adopted.³⁰⁰ For that reason, the commentator said that FRE 501 would have to be amended to include a journalist's privilege, because no such common-law privilege could be recognized by a federal court under the existing rule.³⁰¹ But the district court in *New York Times* did not see the non-inclusion of the journalist's privilege in the original draft of FRE 501 as a bar to the recognition of such a privilege.³⁰²

While it may not be necessary to amend FRE 501 to gain recognition of a journalist's privilege, there are other significant hurdles for journalists. For one thing, it is not clear that the *Jaffee* opinion is more than an aberration from the Court's general policy on privileges. One commentator has called the Court's "strong assertion" of the privilege "peculiar,"³⁰³ while another has said the Court "merely paid lip-service" to common-law principles in its decision.³⁰⁴ Another critic was milder, calling the decision "questionable," but also finding one part of the decision potentially dangerous.³⁰⁵ This was the part of the Court's analysis that also

299. *Jaffee v. Redmond*, 518 U.S. 1, 14–15 (1996).

300. Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 492 (2002).

301. *Id.* at 447–48, 500.

302. *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 505 (S.D.N.Y. 2005).

303. Molly Rebecca Bryson, Note, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffee v. Redmond*, 46 CATH. U. L. REV. 963, 998–99 (1997).

304. Svetanics, *supra* note 131, at 753.

305. *Rule 501—Psychotherapist-Patient Privilege*, 110 HARV. L. REV. 287, 287 (1996).

caused the greatest consternation for Justice Scalia in his dissent in *Jaffee* but would be very helpful for the press: the reliance on state action. Justice Scalia's dissent attacked the majority for recognizing a new federal privilege that was created not by state common law but, in most states, by statute.³⁰⁶ Justice Scalia argued that the fact that the states had enacted a psychotherapist privilege by statute indicated that the matter did not "lend itself to judicial treatment" but to the flexibility of legislation.³⁰⁷ It should be noted that among all of the states that recognize some form of journalist's privilege, thirty-two (plus the District of Columbia) do so through statutes or a formal court rule.³⁰⁸

Even assuming that Justice Scalia's dissent, which was joined by only one other justice, would carry little weight in another privilege case, the fact remains that showing that nearly all of the states recognize a privilege would solve only half of a journalist's problem. Widespread state support for the privilege might indicate that "experience" is on journalists' side (coupled with uneven support for a privilege in the federal appellate courts). But what about "reason"?

A major blow to journalists' cause before the Supreme Court likely would come from an analysis of reason. For starters, the Court has consistently said that the press clause of the First Amendment confers no special privileges on the institutional media.³⁰⁹ This line of precedent would make it exceedingly difficult to persuade the Court to find a constitutional or common-law basis for a journalist's privilege.

As noted earlier, one factor that could weigh against Supreme Court recognition of a common-law journalist's privilege is the fact that the committee that recommended nine specific privileges for recognition prior to the adoption of Rule 501 did not include a

306. *Jaffee*, 518 U.S. at 24–26 (Scalia, J., dissenting).

307. *Id.* at 26.

308. *See supra* notes 55–56.

309. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (finding that First Amendment does not immunize press from lawsuits under doctrine of promissory estoppel for breaking promise of confidentiality to source); *Herbert v. Lando*, 441 U.S. 153, 169–70 (1979) (finding that First Amendment does not prevent libel plaintiff from inquiring into editorial process in order to show actual malice); *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (finding that press has no extraordinary rights to photograph or tape conditions inside county jail); *Saxbe v. Wash. Post*, 417 U.S. 843, 847 (1974) (finding press has no extraordinary rights to demand that it be allowed to interview specific prisoners in federal penal facility); *Pell v. Procunier*, 417 U.S. 817 (1974) (same, with regard to state prisons).

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journalist's privilege on the list.³¹⁰ While this in itself may not be fatal to journalists' hopes, it should be noted that the Court in *Jaffee* did rely in part on the fact that a psychotherapist privilege was on the list to reinforce its recognition of the privilege in that case.³¹¹ The list also did not include a privilege for social workers, but it would be easier for the Court to extend a psychotherapist privilege to social workers performing similar tasks than it would be for the Court to recognize a journalist's privilege that has no similar tie to an existing privilege.

The largest obstacle for journalists, however, comes from a major difference between journalists and the *Jaffee* psychotherapists. In *Jaffee*, the Court was dealing with professionals who are licensed by states to provide specific services. Journalists are not licensed, and there is no clear definition of who may claim the title "journalist." In fact, the Supreme Court in *Branzburg* suggested that even attempting to define a class of persons who could claim protection under a judicially recognized journalist's privilege would raise First Amendment concerns.³¹² The Court's majority opinion said that defining a class of privileged "journalists" would lead to severe problems for the courts in trying to distinguish between members of the institutional press and authors, lecturers, and educators who perform a similar function of informing the public on important issues.³¹³ Any attempt to persuade the Court to recognize a common-law privilege would inevitably lead to a similar problem of defining to whom it applied.

In short, there are factors in privilege law that weigh both for and against Supreme Court recognition of a common-law journalist's privilege. Where does that leave journalists and those who support their desire for a privilege so they can protect sensitive sources while avoiding legal sanctions?

VII. ANALYSIS: COMMON LAW OR SHIELD LAW?

The two years leading up to the writing of this article have not been good times for journalists seeking to avoid identifying confidential sources. In December 2004, a Rhode Island television reporter, James Taricani, was sentenced to six months of house

310. See *supra* notes 299–302 and accompanying text.

311. See *supra* note 299 and accompanying text.

312. See *Branzburg v. Hayes*, 408 U.S. 665, 704–05 (1972).

313. *Id.*

arrest for criminal contempt after defying a judge's order to reveal his source.³¹⁴ Taricani had obtained from the source an FBI tape showing a Providence, Rhode Island, city official apparently taking a bribe from an informant.³¹⁵ The tape was evidence in a pending criminal trial and was covered by a gag order issued by the presiding judge.³¹⁶ Taricani was released early from his sentence for good behavior.³¹⁷ Taricani's source revealed himself before the reporter was sentenced and later was convicted of criminal contempt, disbarred, and ordered to serve up to eighteen months in prison.³¹⁸

In July 2005, Judith Miller of the *New York Times* entered a federal prison in Virginia to serve a sentence for civil contempt.³¹⁹ A federal grand jury subpoenaed Miller to learn the identity of a source or sources within the Bush administration who might have identified an undercover CIA operative to reporters.³²⁰ The operative, Valerie Plame Wilson, is married to Joseph Wilson IV, a former ambassador who has criticized the Bush administration's efforts to justify going to war with Iraq.³²¹ Wilson wrote an opinion piece for the *Times* in 2003 claiming that he had disproved a rumor about Saddam Hussein's attempts to acquire nuclear weapons that the administration had relied upon to justify war.³²² Shortly after his article appeared, columnist Robert Novak reported that Wilson's wife, a CIA operative identified to him by two administration officials, had recommended Wilson for the CIA-sponsored mission to investigate the rumor.³²³ The motive for the leak is not entirely clear. Either the administration was attempting to discredit Wilson by suggesting that his investigation was really a

314. Transcript of Sentencing Hearing at 27, *In re* Special Proceeding, No. 01-47 (D.R.I. Dec. 9, 2004), available at http://www.rid.uscourts.gov/opinions/torres/12092004_1-01msc0047t_sentencing.pdf.

315. *In re* Special Proceedings, 291 F. Supp. 2d 44, 47, 32 Media L. Rep. 1075 (D.R.I. 2003).

316. *Id.*

317. Pam Belluck, *Reporter Granted Release from Sentence*, N.Y. TIMES, April 7, 2005, at A21.

318. Mike Stanton & W. Zachary Malinowski, *Bevilacqua Gets 18 Months for Leaking Tape*, PROVIDENCE J., Sept. 10, 2005, at A1.

319. See Liptak, *supra* note 15.

320. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 967 (D.C. Cir. 2005).

321. See *id.* at 966.

322. Joseph C. Wilson, IV, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4 (Magazine), at 9.

323. Robert Novak, *Mission to Niger*, WASH. POST, July 14, 2003, at A21.

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junket arranged by his wife, or it was trying to get back at Wilson by damaging his wife's career.³²⁴ What is clear is that it is illegal, under certain circumstances, to reveal the identity of an undercover CIA operative to people not authorized to possess such information.³²⁵

Several reporters who were known to have received the same information that Novak received eventually testified to the grand jury investigating whether the leak violated federal law.³²⁶ Miller, however, refused to testify until she was sure her source had released her from her promise of confidentiality and until she received assurances from Special Prosecutor Patrick Fitzgerald that he would not ask her about other sources.³²⁷ Miller left jail in late September 2005 after eighty-five days and testified to the grand jury after both conditions were met.³²⁸ A month later, the grand jury indicted I. Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff and Miller's source, on charges that he lied to the grand jury and investigators about his part in "outing" Mrs. Wilson.³²⁹ His trial began in late January 2007 with a number of reporters on the witness list.³³⁰

Neither Taricani's nor Miller's case would have been good candidates for getting the Supreme Court to consider recognizing a federal common-law journalist's privilege. As the First Circuit noted in rejecting Taricani's appeal of his contempt holding,³³¹ a special prosecutor investigating a possible crime (criminal contempt, in this case) is very much like a grand jury, so *Branzburg*³³² was directly on point in rejecting the existence of a privilege.³³³ Miller's case was even more on point in comparison to *Branzburg* because she was defying a grand jury subpoena in regard to an investigation of specific criminal activity, as the U.S. Court of Appeals for the District of Columbia noted.³³³

324. See Scott Shane, *Private Spy and Public Spouse Live at Center of Leak Case*, N.Y. TIMES, July 5, 2005, at A1.

325. Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (2000).

326. See Liptak, *supra* note 15, at A1; Susan Schmidt, *Post Source Reveals Identity to Leak Probers*, WASH. POST, Sept. 16, 2004, at A2; Jacques Steinberg, *Threat of Jail Is Lifted with Reporter's Testimony*, N.Y. TIMES, Aug. 25, 2005, at A16.

327. Johnston & Jehl, *supra* note 15, at A1.

328. *Id.*

329. Johnston & Stevenson, *supra* note 15, at A1.

330. Neil A. Lewis, *Libby Trial to Display Changed Reporter-Source Relations*, N.Y. TIMES, Jan. 22, 2007, at A16.

331. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

332. *Id.* at 44-45.

333. See *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 969 (D.C. Cir.

A more promising case for a consideration of whether a common-law privilege exists might have been in the *Wen Ho Lee* Case. Six reporters from various news organizations were held in contempt of court by district judges for refusing to give depositions naming confidential sources to Dr. Lee. Five of the reporters failed to comply with an order to give depositions regarding their confidential government sources for stories linking Dr. Lee to espionage and were ordered to pay \$500 a day until they complied.³³⁴ The judge, however, stayed imposition of the fines until the reporters had a chance to appeal.³³⁵ In June 2005, the U.S. Court of Appeals for the District of Columbia rejected the appeals of four of the five reporters: Bob Drogin of the *Los Angeles Times*, H. Josef Hebert of the Associated Press, James Risen of the *New York Times*, and Pierre Thomas of ABC, formerly of CNN.³³⁶ The appellate panel determined that Lee had exhausted reasonable alternative sources when he deposed twenty people working for the Energy Department, Justice Department, and FBI.³³⁷ The appellate court, however, said the district court had insufficient evidence to find one of the five reporters, Jeff Gerth of the *New York Times*, in contempt because he apparently had no information that would be helpful to Lee.³³⁸ In November 2005 the full appellate court declined to rehear the case en banc on a 4–4 vote, with two judges not participating.³³⁹

The sixth reporter, Walter Pincus of the *Washington Post*, who was subpoenaed later than the other reporters and also refused to answer deposition questions, was found in civil contempt of court in November 2005.³⁴⁰ In an unusual twist, Judge Rosemary M. Collyer ordered Pincus to contact all of his confidential sources for the Lee stories and inform them of her decision so that they could have the opportunity to release him from his pledges of confidentiality.³⁴¹ Pincus responded by asking the judge to

2005). Specifically, the court explained that “there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today.” *Id.*

334. *Wen Ho Lee v. Dep’t of Justice*, 347 F. Supp. 2d 26 (D.D.C. 2004).

335. *Id.* at 33.

336. *Wen Ho Lee v. Dep’t of Justice*, 413 F.2d 53 (D.C. Cir 2005).

337. *Id.* at 60.

338. *Id.* at 64.

339. *Wen Ho Lee v. Dep’t of Justice*, 428 F.3d 299 (D.C. Cir. 2005).

340. *Wen Ho Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005).

341. *Id.* at 144.

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reconsider her order.³⁴²

The *Wen Ho Lee* case involved a civil action, which does not raise the type of constitutional or public policy issues that subpoenas related to criminal trials or grand juries raise.³⁴³ Also, unlike the Taricani case, which involved a leak of evidence in a pending criminal case, and the Miller case, which involved a leak that could have been a federal crime in itself, the *Wen Ho Lee* case involved reporting about matters of more serious public concern, including possible espionage. Judge David Tatel of the D.C. Circuit, dissenting from the court's denial of rehearing en banc, said it was "hard to imagine" how Dr. Lee's private interest in pursuing litigation "could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security."³⁴⁴

The *Wen Ho Lee* case also would have posed problems for journalists asserting a common-law privilege. Judge Collyer's decision with regard to Walter Pincus, issued two weeks after the D.C. Circuit's denial of rehearing in regard to the other reporters, specifically rejected the existence of a common-law privilege distinct from any First Amendment privilege that might exist in the circuit.³⁴⁵ Judge Collyer noted that Judge Tatel had proposed a three-part balancing test when reporters were subpoenaed.³⁴⁶ The test would require the party issuing the subpoena to prove relevance of the material sought, exhaustion of other sources for the information, and that the public interest in protecting the source was outweighed by the interest in disclosing the information.³⁴⁷ Judge Collyer suggested that the first two prongs of the test—relevance and exhaustion—were the same as the First Amendment test already used in the circuit.³⁴⁸ The third prong, the weighing of interests, would raise "very troubling" issues

342. Charles Lane, *Post Reporter Asks Judge to Rethink Order*, WASH. POST, Nov. 18, 2005, at A2.

343. For a discussion of the journalist's privilege with regard to criminal proceedings, see Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Court of Appeals Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002).

344. *Wen Ho Lee v. Dep't of Justice*, 428 F.3d at 302 (D.C. Cir. 2005) (Tatel, J., dissenting).

345. *Wen Ho Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 138–39 (D.D.C. 2005).

346. *Id.*

347. *Id.*

348. *Id.*

because it would require judges to determine newsworthiness, she wrote.³⁴⁹

Judge Collyer also argued that *Jaffee* would not favor a ruling for Pincus on the question of whether a common-law journalist's privilege existed. The judge noted that the Supreme Court in *Jaffee* found that the confidential relationship between psychotherapists and patients was central to encouraging the frankness that went to the heart of successful therapy and therefore served a "public good of transcendent importance."³⁵⁰ The judge said keeping a source's identity confidential was only a useful tool for a journalist, not a right of "transcendent importance." She found, therefore, that *Jaffee* was not analogous to Pincus's situation.³⁵¹

Finally—and, perhaps, predictably—Judge Collyer found that recognizing a common-law privilege would require a court to determine who could claim protection under the privilege. "The proliferation of communications media in the modern world makes it impossible" to define "reporter," she wrote.³⁵² Reporters, she noted, do not have special courses of study, are not licensed, and are not subject to organized oversight or discipline.³⁵³ They are not, in other words, anything like the psychotherapists in *Jaffee*.³⁵⁴

Judge Collyer conceded that she might be putting the "horse behind the cart" in her concern for the definitional problems that recognizing a common-law privilege might entail, given that Pincus clearly would fit any definition of "reporter."³⁵⁵ She added, however, that answering the question of whether a privilege should be recognized would necessarily involve answering the question of whom it would protect.³⁵⁶ The two questions "are two sides of the same coin: the first cannot be answered without attention to the second."³⁵⁷

Judge Collyer's concern is reasonable, and it is not the only one that would have made the *Wen Ho Lee* case problematic for journalists if they had succeeded in getting the Supreme Court to grant certiorari and consider recognizing a common-law

349. *Id.* at 139.

350. *Id.* at 140 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996)).

351. *Id.* at 141.

352. *Id.* at 140.

353. *Id.*

354. *Id.*

355. *Id.* at 140 n.23.

356. *Id.*

357. *Id.*

journalist's privilege. As the 4–4 vote on rehearing the first *Wen Ho Lee* subpoena case demonstrates, the D.C. Circuit is divided on whether any such privilege already exists. This division was also evident in the three-judge panel's decision in the same circuit to reject Judith Miller's appeal.³⁵⁸ Although all three judges agreed that the government had overcome any journalist's privilege that might exist, all three wrote separate concurring opinions to point out their differences with each other. One judge argued that *Branzburg*³⁵⁹ not only rejected a constitutional privilege but a common-law privilege as well.³⁶⁰ Judge Tatel disagreed that *Branzburg* foreclosed any common-law privilege and suggested that the fact that most states had adopted a privilege argued in favor of common-law recognition.³⁶¹ The third judge believed that there might be a common-law privilege, but also believed that it was unwise to explore the issue when it was unnecessary to decide the case at hand.³⁶²

Given the wide variation in opinion among judges on the District of Columbia appellate and district courts, both Lee and the subpoenaed reporters could have found ample ammunition for their sides had the Supreme Court granted certiorari. Different problems would have arisen if the Court had taken the Miller case or *New York Times Co. v. Gonzales*³⁶³ or if it agrees to take one of the more recent cases. Miller's case, the *New York Times* case, the BALCO grand jury case,³⁶⁴ and a case involving a freelance video journalist³⁶⁵ all involve grand jury investigations. Recognizing a constitutional or common-law privilege in any of these cases would require the Supreme Court to overturn its own precedent in *Branzburg*. Although journalists have tried in the last few years to argue that *Branzburg* did not foreclose the recognition of a journalist's privilege in all grand jury subpoena cases, judges have by and large disagreed. For example, two reporters who fought subpoenas in the Valerie Plame Wilson investigation lost in their attempt to quash the subpoenas when they could not overcome

358. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

359. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

360. *Id.* at 977 (Sentelle, J., concurring).

361. *Id.* at 986–87 (Tatel, J., concurring).

362. *Id.* at 981–86 (Henderson, J., concurring).

363. 459 F.3d 160 (2d Cir. 2006), *stay denied*, 127 S. Ct. 721 (2006).

364. *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

365. *In re Grand Jury Subpoena, Joshua Wolf*, No. 06-16403, 2006 U.S. App. LEXIS 23315 (9th Cir. Sept. 8, 2006).

what the judge called the “inevitable holding” in *Branzburg* that reporters could not escape grand jury subpoenas without a showing of bad faith or harassment.³⁶⁶ Other courts examining the precedent in grand jury subpoena cases recently likewise have found that *Branzburg* created an “inevitable” situation for the reporters seeking to quash subpoenas.³⁶⁷

Let us suppose for a moment that the Supreme Court did agree to hear a journalist’s privilege case, either an appeal from one of the current cases or an appeal in a case that has not yet come to light. Suppose also that the Court did not feel, in the light of FRE 501’s passage after the *Branzburg* decision, that it was necessarily bound by *Branzburg*’s “inevitable holding.” What would most likely happen?

If the Court conducted a *Jaffee*-like inquiry, journalists likely would argue that there are strong public policy arguments favoring the privilege. They would not have to look far to find such arguments. In his *Branzburg* dissent, Justice Stewart laid out a strong argument favoring a privilege when he noted that reporters often needed to use confidential sources to gather news and facilitate the free flow of information to the public.³⁶⁸ Similarly, the Washington Supreme Court examined the factors favoring a common-law privilege and determined that it was essential in a complex day and age in which people relied on the press to inform them about important matters of public concern.³⁶⁹ The journalists also would note that the journalist’s privilege, like the psychotherapist privilege at issue in *Jaffee*, has been recognized by most states either through statute, constitutional interpretation, or common-law interpretation.³⁷⁰

The party or parties seeking to compel journalists’ testimony (for this hypothetical, let us assume it is the government) likely

366. *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). The reporters, Tim Russert of NBC and Matthew Cooper of *Time* magazine, later testified to the grand jury after their sources released them from their promises of confidentiality. See Steinberg, *supra* note 326, at A2. Cooper, however, was later subpoenaed again and was expected to go to jail on the same day as Miller until his second source released him from a confidentiality promise on the day Miller was sentenced. See Liptak, *supra* note 15, at A1.

367. See *In re Grand Jury Subpoenas*, 438 F. Supp. 2d at 1116; *In re Grand Jury Subpoena*, Joshua Wolf, 2006 U.S. App. LEXIS 23315, at *4.

368. See *supra* text accompanying note 42.

369. See *supra* text accompanying notes 71–79.

370. See *supra* text accompanying notes 55–81.

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would argue, along the lines of Judge Collyer in the *Pincus* case,³⁷¹ that the privilege is a “useful tool” but not a necessity for journalists. The government would rely heavily on *Branzburg* and the concerns expressed there about burdens on lower courts and favoring journalists in a way that other citizens are not favored.³⁷² Depending upon the facts of the case, the government might be able to make a compelling argument that the public interest would be better served by forcing the journalists to reveal their sources, particularly if a national security issue were involved. At the least, the government would note language in *Branzburg* suggesting that the public’s need for “every person’s evidence” is a strong counterpoint to any journalist’s argument that she should be excused from testifying before a grand jury.³⁷³ The government likely would note that a journalist’s privilege was not among the privileges listed by the committee whose work led to the creation of FRE 501.³⁷⁴ The government also would invite the Court to consider Justice Scalia’s argument in his *Jaffee* dissent that state statutory creation of privileges was a strong rationale for a federal statute, but not a common-law privilege created by judges.³⁷⁵

How the Court would decide is anyone’s guess. The facts of the particular case before it would be heavy factors in determining the outcome. In a best-case scenario for journalists, the Court might declare that FRE 501’s adoption had changed the privilege landscape since *Branzburg* and find that a journalist’s privilege existed in federal common law. The Court would be unlikely to go as far as it did in *Jaffee* and create an almost unqualified privilege, however, given that none of the federal circuits nor most of the states have adopted absolute privileges.³⁷⁶ The Court likely would borrow the language from Justice Stewart’s *Branzburg* dissent and require a showing, before a journalist could be compelled to reveal a source, that the information is critical to the underlying case, relevant to the case, and unavailable elsewhere.³⁷⁷ Although the

371. See *supra* text accompanying notes 350–351.

372. See *supra* text accompanying notes 30–33.

373. See *supra* text accompanying note 33.

374. See *supra* text accompanying note 300.

375. See *supra* text accompanying notes 306–307.

376. Among states with statutory privileges, for example, only a handful fail to qualify the privilege in some way in statutory language, and, even in those states, courts often have added qualifiers in specific circumstances. For a more detailed discussion, see Anthony L. Fargo, *The Journalist’s Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL’Y 325, 342–49 (1999).

377. See *supra* text accompanying note 38.

Court was reluctant to add exceptions to the privilege it recognized in *Jaffee*, the Court in our hypothetical might add exceptions for cases in which the journalist's testimony was critical to a matter of national security or cases in which the journalist witnessed the commission of a crime by the source. The Court might also accept Judge Tatel's invitation to add a fourth prong to the Stewart test and require that journalists show in individual cases that the privilege would serve some sort of public interest outweighing the public interest in revealing the source's identity.³⁷⁸

Of course, the worst-case scenario is that the Court would refuse to recognize a privilege and would clarify its *Branzburg* holding to find that neither the First Amendment nor the common law supported such a privilege. This would be troublesome because it likely would lead the federal appellate circuits that have recognized a qualified privilege to reverse themselves in future cases and deny the privilege. Much would depend upon whether the Court limited its holding to grand juries or determined that no privilege existed in any federal proceeding.

Ultimately, the success or failure of journalists' attempts to get a common-law privilege recognized by the Supreme Court would come down to persuading the Court to abandon its trepidation about identifying a class of persons called "journalists." It would be nearly impossible for the Court to ignore an argument similar to Judge Collyer's that the "proliferation of communications media in the modern world" would make it difficult, if not impossible, to define such a class of persons.³⁷⁹ Already, California courts have had to determine whether publishers of online magazines, or "e-zines," could claim protection under that state's shield statute.³⁸⁰ Judge Sentelle's concurring opinion in the Judith Miller case also noted the possibility that courts would have a nearly impossible task in determining whether someone is a journalist given the rise of blogs and other new communication media.³⁸¹ Journalists could

378. See *supra* text accompanying note 344.

379. See *supra* text accompanying note 352.

380. See *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006) (finding that online magazine publishers qualify for shield law protection under California law).

381. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring) ("Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?").

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counter that the federal circuits already have come up with a definition by determining that journalists are persons engaged in investigative reporting who had the intent, at the time information was gathered, of disseminating it to the public.³⁸² Whether the Court would find that definition acceptable, too broad, or too narrow is open to conjecture.

The question remains whether journalists should even try to persuade the Supreme Court to create a common-law privilege, given the worst-case scenario might wipe out the tenuous protection journalists have in federal courts now. The answer is a qualified yes. The Court is more likely to limit its holding to whatever facts are before it, so the worst-case scenario appears unlikely. If a journalist or journalists take a grand jury subpoena case to the Court and it accepts, the Court is most likely to simply clarify its *Branzburg* holding. Journalists might have a greater chance of success if the case involves information subpoenaed in a civil case in which the journalist and her employer are not parties. A civil case does not raise the important public policy or Sixth Amendment issues that exist in a criminal trial, nor does it run up against the “inevitable holding” of *Branzburg* in grand jury subpoena cases.³⁸³

Ironically, and somewhat perversely, the worst-case scenario might actually make it easier to get a statutory privilege passed in Congress. If journalists were stripped of whatever protection they have left in federal jurisdictions, this might persuade reluctant members of Congress that it is time to act.

Several versions of a shield statute were introduced in the 109th Congress and provided some clues as to what type of language might emerge should senators and representatives introduce new versions of the bills in the 110th Congress, which

382. See *supra* text accompanying note 298.

383. A recent ruling in a federal district court in Virginia would be a bad candidate for the Supreme Court because it involves a libel suit against the media. The *New York Times* was ordered to identify confidential sources used by columnist Nicholas D. Kristof in columns that allegedly defamed Steven J. Hatfill, a former scientist suspected of sending anthrax to a number of people in 2002. See Jerry Markon, *New York Times Columnist Must Reveal Sources, Judge Rules*, WASH. POST, Oct. 24, 2006, at B3. A case in which the news organization is a party and attempting to keep information from a libel plaintiff is unlikely to elicit much sympathy for the news organization. See, e.g., *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667 (Mass. 2005) (upholding default judgments against newspaper and reporter for refusing to reveal confidential source to plaintiff in libel and privacy action).

seems likely.³⁸⁴ Of the six shield bills under consideration in the House and Senate during the 109th Congress, five of them shared sponsors or language. Senator Christopher Dodd, Democrat of Connecticut, introduced Senate Bill 369 (S. 369) in February 2005. Senator Richard Lugar, Republican of Indiana, was the sponsor of Senate Bill 1419, which was identical to Representative Mike Pence's House of Representatives Bill 3323 (H.R. 3323).³⁸⁵ Senator Lugar later introduced a new version, Senate Bill 2831 (S. 2831), but Representative Pence did not join him this time. Given that S. 2831 was the most recent version of Senator Lugar's proposal and S. 369 went nowhere,³⁸⁶ it probably is necessary only to discuss S. 2831 and H.R. 3323.

The Lugar bill, S. 2831, would have created a qualified privilege for confidential source identities or confidential information subpoenaed by the government in criminal investigations.³⁸⁷ Disclosure could be compelled upon a showing by the government that the information was critical to an investigation or prosecution, relevant to the proceeding, unavailable elsewhere, and that the public interest in disclosure outweighed the public interest in nondisclosure.³⁸⁸ Similar conditions on the privilege would apply when a journalist was subpoenaed by a criminal defendant or civil litigant.³⁸⁹ The Lugar bill contained several exceptions, including limitations on the privilege when the journalist was an eyewitness to a crime or involved in criminal or tortious activity;³⁹⁰ if the information was needed to prevent a death or substantial bodily injury;³⁹¹ or in cases involving national security.³⁹²

S. 2831 would have defined a "journalist" for purposes of the

384. See Zachary Coile, *Key Lawmakers Urge Justice Department to Rescind Subpoenas of BALCO Reporters*, S.F. CHRON., Jan. 19, 2007, at A1 (reporting that two members of Congress had asked the Justice Department to withdraw its subpoenas of two *San Francisco Chronicle* reporters and that they planned to use the case to back a push for a federal shield law in the new Congress).

385. The Lugar and Pence bills were amended versions of earlier bills, Senate Bill 340 and House of Representatives Bill 581, which also were identical to each other.

386. Senator Dodd's bill attracted only three co-sponsors. See THOMAS (Library of Congress), <http://thomas.loc.gov> (last visited Jan. 25, 2007).

387. Free Flow of Information Act, S. 2831, 109th Cong. § 4 (2006).

388. *Id.* § 4(b)(1)–(6).

389. *Id.* §§ 5–6.

390. *Id.* § 7.

391. *Id.* § 8.

392. *Id.* § 9.

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privilege as someone who was “engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information” for one of the traditional news media, an Internet news service, or any other “professional medium or agency which has as 1 of its regular functions the processing and researching of news or information intended for dissemination to the public.”³⁹³ The Senate bill also would have required that the covered person work for “gain or livelihood” as a salaried employee or independent contractor for the news medium.³⁹⁴ The bill would therefore have excluded hobbyist bloggers and volunteer journalists unless their livelihood came from their journalistic activities.

The Pence bill, H.R. 3323, would have given absolute protection against disclosure of confidential sources unless the information was needed in regard to a matter of national security.³⁹⁵ With regard to unpublished material such as notes and outtakes, the Pence bill would have provided qualified protection, with the qualifications differing depending upon whether the underlying case was criminal or civil.³⁹⁶ The Pence bill only would have limited the power of the executive and judicial branches to subpoena journalists, not Congress.³⁹⁷

The Pence bill defined a “covered person” as any entity that “disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means” through publishing a newspaper, book, magazine, or other periodical; through operating a radio or television broadcast station or network or cable system, satellite carrier, or providing programming via radio, television, cable, or satellite; the parent company of such an organization; or “an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.”³⁹⁸ The bill would have applied to any document created by the covered “persons” in writings, recordings, and photographs, as the terms are defined in Federal Rule of Evidence 1001.³⁹⁹

If a bill similar to S. 2831 or H.R. 3323 passes in the 110th

393. *Id.* § 3(3).

394. *Id.*

395. Free Flow of Information Act, H.R. 3323, 109th Cong. § 2(a)(3) (2005).

396. *Id.* § 2 (a) (1)–(2).

397. *Id.* § 5(4).

398. *Id.* § 5(2)(A)–(C).

399. *Id.* § 5(3).

Congress, the effect would be similar to Supreme Court recognition of a common-law privilege. A common-law privilege would also define the scope of the coverage, the persons who could claim its protection, and possibly any exceptions. The difference would be that a statute would define the terms in relatively concrete and intractable ways, while a common-law privilege would allow flexibility. The flip side of the equation is that a shield statute would provide more predictability for journalists, those who attempt to subpoena them, and their sources than would a common-law privilege that had to develop over time.

In short, there is no easy answer for the problem of how to create a privilege for journalists that would protect them from subpoenas in a consistent manner across all federal appellate circuits. Assuming that Congress does not suddenly leap to the defense of journalists by passing a shield statute in the early days of the 110th Congress, there may be time for journalists to attempt again to persuade the Supreme Court to recognize a common-law privilege. Even if the Court refuses to do so, either by denying certiorari or by ruling in line with *Branzburg*, the statutory privilege option would still exist.

VIII. CONCLUSION

Given the outcomes in the Taricani, Miller, and *Wen Ho Lee* cases, and the uneven protection for journalists shielding their confidential sources among the federal appellate circuits, some sort of privilege is needed to maintain the free flow of information and journalists' independence from government. Of the recent cases, the *Wen Ho Lee* case might have been the most attractive vehicle for taking the issue to the Supreme Court in hopes of getting recognition for a common-law privilege that would bring consistency to federal law. The problem of defining who would be covered by such a privilege, however, would have made the case difficult at best and could have resulted in an adverse ruling that would have left reporters worse off than they are now. Another possible solution would be to persuade Congress to pass some sort of shield law that would serve the same purpose—consistency—while leaving flexibility for the rapidly changing media landscape. Given the nature of the bills introduced in the 109th Congress, this also is not a perfect solution.

If a shield law does not pass in the 110th Congress, one of the pending cases may make an attractive vehicle for getting the Court

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to recognize a common-law privilege if media attorneys can persuade the Court to adopt a definition of “journalist” similar to the one that some federal circuits have already adopted.⁴⁰⁰ Whether the Court would find that reason and experience dictate that it recognize such a privilege is anyone’s guess. If not, the legislative alternative is still available to journalists. There may, therefore, be nothing to lose in trying to persuade the Court that its *Jaffee* reasoning would apply to journalists as well as psychiatric social workers. It is a gamble, but no bigger gamble than the ones that journalists and their sources take in the present legal climate when journalists promise to keep source identities confidential.

400. As this article was being edited, two of the pending cases mentioned earlier came to conclusions. In regard to the subpoenaing of two *San Francisco Chronicle* reporters for their testimony about their source for secret grand jury transcripts in connection with the BALCO steroids investigation, the source came forward voluntarily, leading the government to drop subpoenas for the reporters. Bob Egelko & John Koopman, *Lawyer Enters Guilty Plea as BALCO Leaker; Government Backs Off Reporters—They Avoid Prison Terms*, S.F. CHRON., Feb. 16, 2007, at A1. In the other case, freelance videographer Josh Wolf, who served more time in prison for defying a subpoena than any American journalist in history, agreed to release disputed video footage of a San Francisco protest to a grand jury in return for a promise that he would not have to testify or identify anyone on the video. Bob Egelko & Jim Herron Zamora, *The Josh Wolf Case: Blogger Freed After Giving Video to Feds*, S.F. CHRON., April 4, 2007, at B1.